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Docket No. 732

SILVIO DE VITA,
Petitioner,
vs.
STATE OF NEW JERSEY.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

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Petitioner, Silvio DeVita, a youth of twenty, of limited education, was taken into police custody on November 13, 1951 and held incommunicado for sixty-four hours; subjected to constant, around-the-clock questioning, by relays of four and five police officers; during all that time his only sustenance was a roll, two sandwiches and coffee; he was placed in a cell containing a piece of wood improvised for use as a bed; was denied all communication with members of his family, counsel, friends, relatives, and the right to make any telephone call to anyone. Three days later, on November 16, 1951, when he subscribed to a written incriminatory confession, he received sustenance and then was brought before a committing magistrate. (A magistrate was available at all times prior thereto). At his arraignment before trial, counsel was assigned. His trial commenced February 25, 1952. The incriminating statement and subsequent oral statements were allowed in evidence; the prosecutor was allowed to vary the proof, submit collateral, extraneous, unrelated matters in evidence; incorrectly state the law, influence the jury by inflammatory remarks, inject a legislative intent unsupported by, or inferable from the proof; the trial court refused to charge as to criminal intent and erroneously charged the jury as to its function to resolve the sentence. On March 8, 1952 he was convicted of homicide occurring during the robbery. The jury's "so-called" verdict was uncertain, ambiguous, contrary to the charge and to the law. The court sentenced DeVita to death. He appealed to the New Jersey Supreme Court contending that: (a) the introduction at the trial of his implicatory statement; (b) the court's instruction to the jury relating thereto; (c) the admissibility of certain evidence; (d) the court's charge to the jury; the prosecutor's remarks to the jury in his opening and summation was prejudicial error.

He claimed a denial of a fair trial, of due process and fundamental fairness. The Supreme Court of New Jersey affirmed the judgment on December 15, 1952.

II

Judisdictional Statement

1. The jurisdiction of this court is invoked under Title 28 U. S. C. A., sec. 1257 (3). The petitioner claims the infringement of a right, privilege, or immunity under Article 14, Sec. 1, United States Constitutional Amendment, and Article 1, Sec. 1, 10 of the Constitution of New Jersey 1947.

2. The stage in the proceedings in the trial court, at which, and the manner in which, the federal questions sought to be reviewed, were raised, are as follows:

(a) Although the indictment was in statutory form (R. S. 2A:113-1), (R. p. 226) charging the commission of a homicide and the prosecutor's opening to the jury should have been confined to such issue, the court, over objection (R. pp. 230-231) permitted the prosecutor, to set forth the state's contentions, which were at variance to said issue and to indicate to the jury the intended submission by the state of proof of the substantive crime of conspiracy to rob.

(b) In his opening to the jury, the prosecutor, over objection, was allowed to introduce evidence of immoral activity, unrelated to the charge at issue, (R. pp. 251-252) which the prosecutor knew was improper as evidenced by his statement, (R. p. 935) and which the prosecutor again referred to (R. p. 1136) and offered proof thereof which matters clearly were incompetent, unconnected with, collateral to the issue and highly prejudicial.

(c) The incriminatory involuntary statement, over objection, was marked Exhibit S-69 for identification (R. pp. 650-651) and S-69 in evidence (R. pp. 687-692).

(d) In his opening and summation to the jury, the prosecutor incorrectly stated the law (R. p. 1115); improperly influenced the jury to passion and prejudice, by inflammatory remarks (R. pp. 1116-1140), and injected a legislative intent, unsupported by and unrelated to the proof, nor inferable therefrom. (Although no application for a mistrial or a request to disregard the statements was made, under Supreme Court Rule 1:2-19(a) of New Jersey, such common error apparent on the face of the record is reviewable).

(e) The trial court's omission to charge DeVita's request, (No. R-41), (a criminal intent to commit robbery), over objection, (R. p. 1163), and the erroneous instruction, (R. p. 1145), and statement by the trial court to the jury,

> "Certain facts seemed to be, if not admitted, seemed to be not controverted;"

and the further statement,

> "If that condition does not arise, the penalty is death, determined not by the jury but *by the statute* and pronounced by the court. It is not correct to say that the jury imposes the sentence of death where it does not choose to make the recommendation for life imprisonment;" (R. p. 1161),

and,

> "A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme which he has helped to devise and carry forward," (R. p. 1157),

(a general exception to which and to the entire charge was made), (R. p. 1163); and,

(f) The "so-called" verdict of the jury is not in conformity to the charge, (R. pp. 1161-1162), nor to the statute R. S. 2A:113-2, and is ambiguous, doubtful, uncer-

tain and void; and the judgment of sentence of death thereon is an act *coram non judice* constituting prejudicial error.

3. The stage in the proceedings in the New Jersey Supreme Court, at which, in the manner in which the federal questions sought to be reviewed, are raised, as as follows:

(a) In the appeal, taken to the New Jersey Supreme Court, pursuant to Rule 1:2-1 (c), of the New Jersey Supreme Court, (Art. 6 Sec. 5-1(c) Const. N 5 1947) DeVita urged for reversal these grounds:

POINT I—The court erred in admitting into evidence the defendant's alleged oral and written confessions and in its treatment of the subject.

A. The State did not sustain its burden of proving that the confession was voluntary.

B. The trial court erred in its application of standards for determining whether the confession was voluntary.

C. The trial court erred in its instructions to the jury with respect to the confession.

POINT II—The court erred in failing to leave to the jury the essential elements of the crime and the opportunity to bring in a lesser verdict.

POINT III—The court's charge with respect to a recommendation of life imprisonment was erroneous.

POINT IV—Defendant was denied a fair trial by reason of prejudicial comments of the prosecutor relating to the jury's function with respect to punishment.

POINT V—The trial court erred in admitting evidence unrelated to the crime charged; the prosecutor's argument relating thereto was improper and unfair; and defendant was denied a fair trial.

POINT VI—The court erred in refusing to charge that the jurors could change their vote at any time including the time when the verdict was announced in open court.

4. The manner in which the federal questions sought to be reviewed were passed upon by the Supreme Court of New Jersey, is reported in re: State v. Grillo, 11 N. J. 173,

Advance Sheets No. 7, dated February 16, 1953, affirming the judgment; Mr. Justice Heher dissenting, copies of the opinions whereof are appended hereto.

II (a)

Judgment and opinions of the New Jersey Supreme Court, stay of execution and extension of time for filing of the petition for writ of certiorari to the United States Supreme Court.

A. The Supreme Court of New Jersey sustained the judgment of the trial court on December 15, 1952.

B. The majority and dissenting opinions of the Supreme Court of New Jersey are set forth in the transcript. (R. pp. 1188-1209).

C. An application to stay the execution of sentence of death to enable the petitioner to apply to the United States Supreme Court for a writ of certiorari was denied February 18, 1953, and the trial court entered the order February 25, 1953.

D. An application to the New Jersey Supreme Court to recall the mandate and stay the execution of the sentence of death was denied February 19, 1953.

E. The United States Supreme Court stayed the execution of the sentence of death pending final disposition of a petition for a writ of certiorari on February 19, 1953.

F. The United States Supreme Court on February 25, 1953 extended the time for filing the petition for a writ of certiorari to and including April 20, 1953.

II (b)

Specific portions and reference to the record of the matters supporting the assertions that the Court's rulings were of a nature to bring the case within the statutory jurisdictional provision.

A. Prosecutor's opening to the jury; (R. pp. 230-233)

In other words, ladies and gentlemen—and again the state contends this—insofar as guilt is concerned under our law all three of the defendants, DeVita, Rosania and Grillo, if they are guilty at all in this case, they are guilty of murder in the first degree. The fact that the evidence will show that the defendant, Grillo actually fired the fatal shot and the other two did not fire any, does not in any way differentiate between them insofar as the degree of guilt is concerned.

This killing, the state contends, was wilfull and deliberate and when these defendants, as the evidence will show, agree and conspire to perpetrate a robbery and they armed themselves with guns and one of the defendants fired his gun, killing James Law, they knew and realized what the results would be, and they deserve no consideration at your hands.

Mr. Bozza: Now if your Honor please. That is strictly argument. It is all right to tell them the law and your Honor's ruling and to hypothecate what the state intends to prove. But that conclusion, that they are not worthy of any consideration at your hands, is strictly an argument and it is trying to inflame the minds of the jury prejudicially against these accused. I ask your Honor to instruct the jury to disregard the last statement.

The Court: I will allow it to stand.

Mr. Giuliano: I repeat that it is the contention of the state that these defendants deserve no consideration at your hands.

Mr. Bozza: I press my objection, your Honor, because of the emphasis. It is going beyond the standard of an opening and he is now taking advantage of your Honor's ruling. I think some limitation should be put

on the law in that he first confesses that the expression of the law is a function of the Judge. If this goes on he won't give your Honor anything to do.

Mr. Giuliano: I object to that statement of Mr. Bozza.

The Court: I will allow it to stand. You may continue.

Mr. Giuliano: The law pertaining to a killing committed in the perpetration of a robbery provides as follows. So there will be no mistake about it I am going to read it to you: Murder which shall be perpetrated by means of poisoning or lying in wait—you are not concerned with that part of the law—or by any other kind of wilfull, deliberate and premeditated killing—and you are not concerned with that part of the law—or which shall be committed in perpetrating or attempting to perpetrate arson, burglary, rape, robbery or sodomy shall be murder in the first degree.

The State contends under the statute which I have just read you that when a number of persons are acting together in a plan to commit a robbery, a killing perpetrated in furtherance of the crime is deemed within the common purpose and all are alike responsible for it. The State says that each is responsible for everything done by his confederates which reasonably follows in the execution of the plan as one of the natural and probable consequences.

Mr. Bozza: I object on this ground, your Honor, on the ground that the law of robbery is not what the Prosecutor just read. That is the law of conspiracy. Now robbery merges the conspiracy in this indictment. So I don't think it is proper for him to discuss conspiracy where the lesser crime merges in the conspiracy which merges in the murder. I object to it on that ground. It circumscribes what the defendants must prove if this stands before the jury and on the record. It limits the defense.

The Court: Ordinarily, Members of the jury, the Court does not allow either the Prosecutor or defense counsel to quote law to the jury. The Court is permitting it in this case because it concedes it is necessary in order for the State to make explicit what its contention is. The Court will allow the defendants to make the same explanation.

You will realize that the law of the case will be controlled by the Court mainly in its charge at the end of the case.

You will consider what the Prosecutor is now saying as being the contention which the State will project to you.

You may proceed.

(Mr. Giuliano (prosecutor) proceeds with his opening statement to the jury as follows:)

I think I told you that the State contends that each is responsible for everything done by his confederates which reasonably follows in the execution of that plan as one of the natural and probable consequences, even though the killing may not have been intended as part of the original plan, or even though it was forbidden by one of them.

In other words, the State says that when several persons conspire and agree to commit the crime of robbery and together set out on the common purpose of robbing a person and murder results, all are equally guilty of murder in the first degree.

The State says the defendants in this case agreed together to rob the Universal Food Market or its agents at 595 Broad Street, Newark, and all three went together, on that common purpose for the specific purpose of holding up and robbing the Universal Food Market, which resulted in the killing and murder of James Law, and if the State proves the facts of the killing as contended beyond a reasonable doubt, then, Ladies and Gentlemen, it is your duty to return a verdict of guilty of murder in the first degree.

Continuing on, (R. p. 251) the prosecutor was allowed to state in his opening to the jury,

June Hazen went on to her home in Astoria. DeVita and Grillo checked in at the Albert Hotel. DeVita stayed with Wyona Stouffer. While in the room Wyona Stouffer will testify that she noticed a large roll of bills on the dresser. The next morning the three of them, Grillo, DeVita and Wyona Stouffer had some breakfast and before they parted, DeVita took $100 of this money that had been stolen from the Universal Market and handed it to Wyona Stouffer. Earlier that morning Grillo had given June Hazen, as she recalls, $20 or $30. (R. p. 252).

The prosecutor continued to address the jury, in his opening (R. pp. 256-257):

> If the state, as I said before, establishes these facts to you beyond a reasonable doubt, then you are under a duty, I say, to return a verdict of guilty of murder in the first degree. This was a cruel, vicious * * *
>
> Mr. Bozza: I object to that characterization as unjustified, that this was a crude, vicious—following the explanation of the law and that is the contention of the State that this is a case of murder in the first degree. There is no evidence to base such a characterization on. It is a conclusion; it is a hypothecation; it is done merely to inflame the minds of the jurors and to fix their minds on one single point of law in this case. I ask that it be eradicated from the minds of the jurors.
>
> The Court: I will deny the motion. Don't argue the case, Mr. Prosecutor.
>
> Mr. Giuliano: The State contends that this is a case of murder in the first degree. The State contends that the defendants deserve no consideration at your hands. The State contends there should be no compromise in your verdict. The State contends that your verdict in this case should be guilty of murder in the first degree against all three defendants, and the State asks you ladies and gentlemen to remember what the legislature said, that the penalty for first degree murder in this state is death unless the jury, upon and after a consideration of all the evidence, attaches to that verdict a recommendation for life imprisonment.
>
> We say—the State says—this is the kind of case the legislature had in mind when it said that the penalty for first degree murder is death.

B. Arraignment and Confession.

SILVIO DEVITA (R. p. 652).

(By Mr. McGlynn):

Q. What time and on what date were you arrested? A. Tuesday, between 1:00 and 1:30 in the afternoon.

Q. Tuesday, November 13, is that right? A. Yes, sir.

Q. How soon after you were arrested were you questioned? A. As soon as I got there.

Q. And from that time on until November 16 at about 6:00 o'clock in the morning about how many times were you questioned? A. Constantly questioned. (R. pp. 652-653).

Q. Can you give me any idea about how many men questioned you in number? A. There was always four or five.

Q. And when they did question you how long would you be questioned? How long would it last at one particular session without interruption or ceasing? A. Four or five hours.

Q. That would be true of whatever day of the week that is? (R. pp. 653, 655). I covered the 14 with you. What about the 15? What was done with you on the 15? A. The same thing was done on the 14.

Q. Starting at 5:30 or around that time on the afternoon of the 15 did the questioning cease or did it continue uninterruptedly from then until when? A. It continued.

Q. Did it continue all night long? A. Yes, sir. (R. p. 655).

Q. Did you make any requests of anyone who was in apparent charge, or was questioning you, for permission to see your friends or relatives? A. Yes, sir.

Q. Was your request granted or denied. A. They said I can't see no one.

Q. Did you also make any requests for the purpose of having counsel or a lawyer see you? A. Yes, sir.

Q. What was done with reference to that request? A. They said it is impossible.

Q. So that from November 13 at 1:30 p. m. when you were arrested you were in the Newark police headquarters located in the rear of the Newark City Hall until the morning of November 16 at about 10:00 or 11:00 o'clock, whenever it was, when you were first taken before a magistrate? A. Yes, sir. (R. p. 656).

Q. Had you made any requests to these men who had you in custody for permission to make a phone call to your friends or family? A. Yes, sir.

Q. Had that request been granted or denied? A. They said that was impossible. (R. p. 657).

SILVIO DEVITA re-called by Mr. Giuliano: (R. p. 682) (Pros.).

Q. And they kept taking you out every hour or so? A. Yes.

Q. All night? A. All night.

Q. From 12 o'clock midnight right to the next day? A. Yes, sir.

Q. Then on the next day, the 14th, they kept up the same thing until midnight of the 14th. Is that what you want us to believe? A. Yes.

Q. And from midnight of the 14th up to the next day, the 15th, they did the same thing? A. Yes.

Q. That continued right through to the 16th to the time you were arraigned in court? A. Yes.

JOSEPH A. KINNEY (State's witness) (R. p. 548). Rosania stated that he asked Grillo what happened, and Grillo told him, "Nothing". After they reached the diner Marchese and Rosania went inside and didn't see Grillo and DeVita again that night. He met Grillo on the early a. m. about 12:30 a. m. on November 13 in the diner and by that time he stated that he had read in the paper that the guard had been shot and subsequently died, and he asked Grillo why he shot him and Grillo said he had to shoot him because he went for his gun.

Sgt. Joseph A. Kinney offered by the State (R. p. 552) referring to the length of time that DeVita was in custody,

Q. So it was at least two full days or practically three days—the 13, 14 and 15—that he was in custody before this conversation you are talking about? A. Yes, sir.

(And on direct examination continued by the prosecutor,) (R. p. 557).

Q. Now after all three defendants had made these statements to you and the others, did you cause a complaint to be made against all three defendants charging them with the murder of James Law? A. Yes, sir.

Q. Where and about what time was that complaint made? A. Complaint was made about 11 p. m. on the night of November 15 in the Municipal Court, Part I;

(And on R. pp. 558-559 the Sergeant continued:)

Q. Will you tell us in what manner the statements were taken from each of the three defendants? Were they taken in the same room or separate rooms? A. No, sir. The defendant Grillo gave his statement in the tabulation room, which is separate from the homicide and bandit squad room. It is also on the fourth floor of police headquarters and separated from the bandit and homicide room by a corridor in a north-south situation on the four floor of police headquarters. The statement of Rosania was taken in the homicide and bandit squad room. I think the statement of DeVita was taken in the interrogation room that adjoins the bandit and homicide squad room. It was out of the presence of each other that the statements were taken.

Q. The statements were taken out of the presence of each other in separate rooms? A. Yes.

(R. p. 560)

Q. Were Mr. Schaedel and Mr. Webb (assistant prosecutors) present during the taking of the statement and before it was signed? A. Well, during the taking of the statement Mr. Schaedel and Mr. Webb came in the room. I was in several times during the night, but they weren't—or during the morning—but they weren't present during the entire taking of the statement.

Q. In and out? A. That's right.

(Mr. Giuliano) (R. p. 562):

Q. You were investigating a murder. Isn't that so? A. Yes, sir.

Q. And you did not let him see a member of his family or even a lawyer until you had questioned him. Isn't that so? A. Yes, sir.

(R. P. 564)

Q. In this particular case, from November 13, 1951, when DeVita was arrested, until the evening of the 15 or the early morning of the 16 when his written statement was taken, you would allow no one to see him or allow counsel to talk to him? A. I told you before that that matter did not come up as far as I know. That is the only way I can answer it.

Q. (R. pp. 564, 565-566) But Mr. Giuliano asked you a question, and he said, "You wouldn't allow anyone to see him?"

Mr. Giuliano: Until he questioned him I said. I put that in my question.

Q. Until you had questioned him? A. Yes, sir.

Q. There is no question about a magistrate having been available prior to, what was the date of that charge again?

Mr. Giuliano: November 15 the complaint was made as I understand it.

Q. At what time? A. About 11 p.m.

Q. And the arraignment was the next morning? A. Yes, sir, about 9:30, 10:00 o'clock.

Q. There was a magistrate available prior to that? A. Yes, sir.

Q. (R. pp. 566-567) Restrictions are placed upon defendant, are they not, or the person who is in custody? A. Until the investigation is completed, whenever it may be.

Q. And those restrictions mean that no one can see him until he is taken off that list or until those restrictions are lifted, do they not? A. Either that, or the investigating officers might be sent for and talked to about it.

IRVING W. SCHOENEICK (State's witness) (R. p. 619).

(By Mr. Guiliano, Prosecutor):

Q. Detective, after the defendant DeVita was arrested on the 13, was he questioned by you and other members of the bandit squad on the date of the 13? A. He was questioned by all of us.

Mr. McGlynn: "All of us?" A. Yes. When I say that I should stipulate there were five of us.

GEORGE E. MEAGHER (State's witness) (R. p. 624).

(By Mr. Guiliano, prosecutor).

Q. Mr. Meagher, did you take a statement from defendant, Silvio DeVita? A. I did.

Q. Who was present at the time the statement was taken from Silvio DeVita? A. Detective Coppola of the Newark bandit squad.

Q. What room was this statement taken in? A. In the conference room off the bandit squad and homicide room.

Mr. Guiliano: May I ask that this be marked for identification. (The statement referred to is marked S-69 for identification).

Q. I show you Exhibit S-69 for identification and ask where you got the information contained in that statement. A. From defendant, Silvio DeVita (R. p. 625).

Q. That is in your handwriting. Is that right? A. Yes, sir.

Q. Had you interviewed defendant DeVita at any time before taking that statement which is marked S-69 for identification? A. Yes, sir.

Q. When was that? A. November 14.

Q. Where was that? A. In the conference room off the bandit squad room of police headquarters on the fourth floor.

Q. Didn't he make any statements to you with respect to this matter at that time? A. No, sir.

Q. (R. p. 625) He made no admissions at that time? A. No, sir.

By the Court: Q. At what time did you take the statement? A. I started the statement at 12:40 a.m. on November 16, 1951.

Q. Were the other two defendants being interviewed at the same time and statements being taken from them? A. Yes.

(R. p. 627)

Q. How long did it take you to take the statement which you took? A. I completed the writing of the statement with the exception of the last paragraph at 4:20 a.m. on the morning of the 16. I started at 12:40.

(R. p. 629)

Q. Now, did anything else occur there after the statements had been signed? Do you recall anything occurring? A. After they were signed?

Q. Yes. A. Yes. They had breakfast, ham and eggs and coffee.

Q. Did defendants have breakfast? A. Yes, sir.
Q. Now, did Mr. Schaedel have any conversations with any of defendants? A. He did.
Q. Was that before the signing of the statement or after or both? A. After the signing.

(R. p. 630)
Q. And is that your signature? A. Yes.
Q. As a witness to the signature of defendant, DeVita on each and every page? A. Yes, that is correct. Yes, sir.
Mr. McGlynn: How many?
Q. Will you count them Mr. Meagher, please. A. Nine.
(Cross examination by Mr. McGlynn: (R. p. 631).
Q. The language in the nine pages of Exhibit S-69 that you wrote are your language? A. No, sir.
Q. It is not a verbatim statement? A. Yes, sir, it is.
Q. Word for word? A. Yes, sir. DeVita's.
Q. Are you sure that every written word in there is his own language? A. Yes, sir.

CHARLES V. WEBB, JR., (State's witness).

(Cross examination by Mr. Sommer) (R. p. 644).
Q. Mr. Webb, while you were at police headquarters on the morning of the 16th, were any of the defendants given anything to eat or drink other than water. A. Yes—
Q. —until after the statements were completed? A. Yes.
Q. What were they given? A. They were offered coffee and defendant Grillo did drink some coffee. I don't think that defendant DeVita had any coffee.
Q. Until after the statements had been signed and then they were fed? A. I believe that is correct.

CHARLES T. SCHAEDEL (State's witness) (R. p. 649).

(Cross examination by Mr. Bozza).
Q. You were not there on the 14th when Rosania was questioned after he was brought in? A. No.
Q. Nor were you there early on the 15th? A. No.

Q. You were there just beginning at 2:00 o'clock on the morning of the 16th. A. That is correct.

Mr. Giuliano: The state offers in evidence S-69 for identification, which is the statement of defendant, Silvio DeVita (R. p. 651).

The prosecutor in his summation to the jury (R. p. 1139) stated,

> DeVita and Grillo were arrested on the 13th; Rosania on the 14th. They were working around the clock, as has been testified here, breaking this case wide open. On the evening of November 15 at 6 o'clock or 7 o'clock, all defendants had admitted their guilt orally.

Such statement is dispositive of the continuous interrogation of the petitioner while in custody prior to arraignment.

C. Grounds of Objection to Admission of Confession.

(R. p. 660)

The Court: Suppose you proceed to state your grounds of objection.

Mr. McGlynn: The basis of my objection is that it rests first upon the case of Watts v. Indiana, 93 Law Edition 1801, 338 U. S. 49, United States Supreme Court 1949. (R. pp. 661-668).

"A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary, of course, need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation

implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."

Also the case of Harris v. South Carolina, 338 U. S. 68, 93 L. Ed. 815, United States Supreme Court 1948:

"Upon appeal, the highest court of the State made a conscientious effort to measure the circumstances under which petitioner's confession was made against the circumstances surrounding confessions which we have held to be the product of undue pressure. It concluded that this confession was not so tainted. We are constrained to disagree. The systematic persistence of interrogation, the length of the periods of questioning, the failure to advise the petitioner of his rights, the absence of friends or disinterested persons, and the character of the defendant constitute a complex of circumstances which invokes the same considerations which compelled our decisions in Watts v. Indiana", and several other cases are cited.

That, to me, outlines the basis of my argument and my objection to the confession. I say under that the testimony taken on such an objection should be limited strictly to the circumstances concerning the length of time and the circumstances and has nothing to do with the question of the contents of the statement. I must respectfully say that the defendant's choice of words in the answer your Honor just quoted was unfortunate. I did not understand it as you understood it. I do not understand him to say that everything in this statement is untrue. His statement is that some of the things are untrue, and his choice of words is bad.

The Court: I understand your objection is based upon an alleged violation of the constitutional rights of this defendant—

Mr. McGlynn: That's right.

The Court: —as determined in the Watts case regardless of whether the statement is inadmissible by

reason of the violation of those rights and regardless of whether or not his statement is voluntary and true.

Mr. McGlynn: That's right.

The Court: Even though the statement is voluntary and true it is still inadmissible on the ground you stated.

Mr. McGlynn: That's my point.

The Court: And that is your only ground?

Mr. McGlynn: That's right, sir.

In fact, pardon me for just a second. I was just given a case from one of Justice Murphy's dissenting opinions, but it gives you my opinion—Taylor v. Alabama, 334 U. S., "And it is void even though the confession is in fact true and even though there is adequate evidence otherwise to sustain the conviction."

The Court: What do you say, Mr. Prosecutor?

Mr. Congleton: If the Court please, we are now in this situation. That even if that be Mr. McGlynn's only ground of objection, in order to lay the foundation for that ground he has put his defendant on the stand, and his defendant has testified to certain things. Now, the State has a perfect right, as we see it, to attack the defendant's credibility on what he has presently or just previously testified to under oath. One of the things that becomes very important, even under the point raised by Mr. McGlynn, is that those cases—and I happen to be familiar with them—are based upon the proposition that there was a constant interrogation which resulted in the confession for which the defendant was convicted.

In this case the defendant has not even testified yet that what he alleges as a constant interrogation was in connection with this case. And so the State feels that under the right of attacking the witness and cross examining him on his credibility, the defendant having said parts of these statements are not true, we have a perfect right now to cross examine him on those subjects.

The Court: Do you desire to say anything, Mr. McGlynn?

Mr. McGlynn: Yes, there is one thing I did want to say, your Honor. I don't think in connection with

DeVita that there have been any other statements marked. I think I am correct, am I not? This is the only statement?

Mr. Giuliano: That I am going to ask him about.

Mr. McGlynn: Wait a minute. With reference to the defendant, Grillo, if your Honor will remember, on Saturday Lieutenant McMahon was on the stand. At the beginning of page 822 and down to page 832 your Honor will find at least—don't hold me to it—eight or ten, as I recall the circumstances, statements that were marked for identification and placed upon the reporter's desk, within three or four feet of the jury box, until they assumed a pile of about, I imagine a foot high. Very studiously, very carefully, the Prosecutor refrained from making any mention of anything about those statements, except they were about other matters. He hasn't done it yet in my case, but I understood him to say right now that he intends to do so.

While we have the jury out to save a little time on these recesses, let me speak my piece about that procedure, in connection with this very objection. I think, if your Honor please, that that procedure and that practice of marking those statements for identification and piling them on the desk in front of that jury is prejudicial to the nth degree to any defendant in this case, including mine. The State is doing by that indirectly what it can't do directly; it is bringing to the attention of this intelligent jury, and if they were morons they couldn't help but get the inference and deduction which is being created, that these defendants, including mine, are charged with other crimes for which they have not been tried and for which they have not been convicted. And I think that procedure —I don't care how they get it in—whether they have a policeman say he can't remember who interrogated them on November 14, and using that as a pretext, mark eight or ten statements for identification—I say it is wrong. And if it is done in my case, I will say to your Honor now most respectfully I shall register my objection, and I shall at the conclusion of the objections, if they are not sustained respectfully move for a mistrial.

The Court: As I recall it, when those statements were marked for identification on Saturday I was not called on for any ruling on them whatever. I do not think there was any objection made.

Mr. McGlynn: Sir, I couldn't very well; they didn't deal with my client.

The Court: However, if there is an objection made, I will deal with it.

The situation, as I understand it, Mr. McGlynn, is this:

We are talking in the absence of the jury. You put your client on the stand, and he has testified to constant questioning.

Mr. McGlynn: Yes, sir.

The Court: For a couple of days, culminating in his alleged confession. To my mind, sitting without any previous knowledge of this case, and, I presume, to the jury's mind, I would assume that he had been questioned all that time about the offense for which he is now being tried. And if he were, that might be very material on the question of whether his constitutional rights had been violated, if he was subjected to some 48 hours of questioning.

Now, the Prosecutor has intimated that he has proof that is not so at all; that he was never questioned about this offense until, as I recall it, the night or the evening of the 15th of November, which was two days after he was arrested. Then in the meantime he had been questioned about other offenses. Obviously, it is not fair to the State to allow a false impression to go to the jury, if the Prosecutor's contention is correct —that he was not interviewed about this crime at all during the first two days of his incarceration. And certainly that is not the impression that has thus far been created by the direct examination. So I would like to hear you on that.

Mr. Giuliano: May I correct your Honor in one respect? There is testimony in the case that Investigator Meagher on the evening of the 14th interviewed the defendant DeVita and that the defendant denied—

The Court: He said he interviewed him for about fifteen minutes.

Mr. Giuliano: He denied any participation in this particular crime.

The Court: That is correct.

Mr. McGlynn: I am not interested in that detail; that to me is not substantial.

I would like to address your Honor on what you just said, because I think it is most important. I respectfully suggest the Court has the wrong slant, in my humble opinion, on the proposition.

I do not think, from a reading of these United States Supreme Court cases that it makes a single particle of difference whether the defendant is being interrogated about this crime or any other crime, or what he is being interrogated about; it is the assault upon his mentality, it is the assault upon his feelings; it is the assault upon those things which the Court says in those opinions, under our constitutional rights he has the right to have protected.

And I don't think that your Honor can say or that anybody can say that here is a man who was brought in on November 13, at 1:30 p.m. who was questioned for ten hours on Crime A, who was questioned for the next ten hours on Crime B, and so on, to the end of what we are talking about—November 15—and say, "Your client was interrogated only about this particular alleged murder from 6 p.m. on November 15." I don't think that is the principle.

The Court: Well, I repeat that the impression in my mind was—I know nothing about the case—but it must be in the jury's mind, that with the exception of that conversation that Detective Meagher had on the afternoon of the 14th with this defendant, your client was being questioned for over two days about the murder of James Law. Now you say it doesn't make any difference what he was being questioned about. I can't agree with that to any extent whatever, because, of course, it makes a difference as to whether or not the statement with reference to the Law murder was elicited after two or three days of constant questioning, or whether it was elicited after fifteen minutes of questioning.

Now, the mere fact that he and others may have been incarcerated and held incommunicado while the police were busy interviewing them and taking statements—maybe, as you say, he didn't get enough to

eat, maybe his sleep wasn't too restful—that is quite a different question when we are discussing their constitutional rights. What are their rights under the circumstances? The Court would have to know all the circumstances to pass upon it.

(R. pp. 688-689, 692).

The Court: The State has offered in evidence Exhibit S-69 for identification which purports to be a voluntary statement of the defendant Silvio DeVita. The Court has heard the testimony in relation thereto offered both by the State and by the defendant, part in and part out of the presence of the jury.

As I understand the objection it is that the statement purporting to have been made by the defendant is inadmissible, regardless of the fact that is conceded that it was both voluntarily made and is true; that is, it is contended it is inadmissible because it was obtained from the defendant in violation of his constitutional rights under the due process clause of the Fourteenth Amendment of the Federal Constitution. As I understand it, it is contended that the statements were elicited after prolonged and relentless questioning without his having the assistance of counsel or the benefit of consultation with his family and friends, without a warrant or arraignment, and without being advised of his constitutional rights.

As I understand the law from the cases that have been cited: the Watts case, the Haley case, the Harris case in the Federal Supreme Court, and also the Cooper case in our own Supreme Court, it is the law that the meaning of the due process clause of the Federal Constitution is the exclusive province of the supreme federal authority, and the standards established by that court must be applied by the state courts even though in the main the proper administration of the criminal law of the states rests with the state courts.

The state courts must not only see that the defendant's constitutional rights are preserved to him completely unimpaired, but the State courts must also protect the rights of the public in seeing that justice is done in a proper case; and unless the Court is satisfied that the constitutional rights of a defendant have

been infringed upon by the police or others, it should not rule out of a case evidence which is otherwise legally admissible solely because the defendant protests that his guarantee of due process has been violated, and introduces that issue into the case.

The rulings of the high courts in cases involving the question of due process have all been based necessarily upon situations and sets of facts peculiar to each respective case, and so here the standards of law with respect to constitutional rights must be applied to the peculiar set of facts as they have been testified to in this particular case.

After considering the principles of law and the facts I conclude that the constitutional rights of the defendant DeVita have not been violated. I overrule the objection to the admission of the exhibit into evidence, and it will be received in evidence and the objection of the defendant DeVita will be noted.

Mr. McGlynn: Your Honor gave me the privilege of reading the statement and enlarging my objection after I read it. The only thing I want to add in addition to what I said—I don't want to misunderstand the Court—about your description that the statement is voluntary. The Court appreciates I mean it is voluntary from the physical standpoint, because the mental standpoint is covered in the cases cited.

The Court: You mean his constitutional rights have been violated and they could not be voluntarily violated. Is that the point you make?

Mr. McGlynn: That's right, sir.

The Court: I think we use the word voluntary in the sense it was made without force and willingly.

Mr. McGlynn: That's what I mean.

The Court: You have no other objections?

Mr. McGlynn: No, sir.

The Court: How long will it take you to read this statement?

Mr. Giuliano: The Prosecutor will read it.

The Court: We will take a short recess.

(Recess.)

(The jury returns into the courtroom.)

Mr. Congleton: If the Court please, I ask that Exhibit S-69 for identification be marked in evidence.

The Court: It will be so marked.

D. Unconnected, Unrelated Proof of Crime and Acts of Immorality.

(R. pp. 821-822)

JUNE HAZAN (State's witness).

By Mr. Giuliano:

Q. Between the time that you first met them and up to and including November 10 and 11 how frequently did they come into the club?

Mr. McGlynn: May I note an objection to that part of the question that deals with any events subsequent to November 9 at 8 p.m., on the ground that it is immaterial and irrelevant and has nothing to do with the alleged crime for which they are on trial, and obviously all it can do is bring before the jury testimony which would tend to inflame and prejudice them.

The Court: What is the purpose of this testimony, Mr. Prosecutor?

Mr. Giuliano: Well, your Honor, specifically after November 9, you mean?

The Court: Yes.

Mr. Giuliano: First it goes to the question of flight; secondly, it goes to show that at the time the defendants had in their possession the loot, and that they were spending part of the loot; that they were still together in flight, and for those reasons I think the testimony is proper.

The Court: The objection will be overruled.

(R. pp. 822-823) Q. After the club closed did you go anywhere with the defendants? A. Yes.

Mr. McGlynn: Now, may I, in addition to my objection, state to your Honor that in view of the Prosecutor's remarks to you, giving you his idea of why this testimony is relevant and material, register a still further objection that I do not think any of the details which occurred between this young lady and these two men have anything to do with flight, as he mentioned it, because I can't conceive of flight in this case at all. Second, I don't see what materiality or relevancy there is to the question of what was done with the so-called alleged loot. It is obviously intended—and I say this sincerely without any reflec-

tion—intended to inflame the minds of this jury prejudicially against my client.

The Court: You do not contend that the evidence, indicating possession by them of the so-called loot, would be evidential?

Mr. McGlynn: I don't see how this witness can possibly testify that what they had was part of the alleged loot.

The Court: In view of the testimony of the witness yesterday afternoon I will overrule the objection.

Mr. McGlynn: Even that did not tie it up to this alleged loot except by a rather broad use of imagination.

The Court: I will overrule the objection but will instruct the Prosecutor to confine his questioning to the line indicated by him as the purpose of it.

(R. pp. 825-826)

Q. How long did defendants remain in your company on the evening of November 10?

Mr. McGlynn: I object to that, if your Honor please, on the same grounds I stated.

The Court: I will overrule the objection.

WYONA STOUFFER, (State's witness) (R. p. 828).

Q. And between the first time you met them and up to and including November 11, how often did you see the defendants DeVita and Grillo?

Mr. McGlynn: I again register my objection with reference to any events which occurred after November 9, because it is now obvious that the Prosecutor's intimation that flight is one of the attempts to introduce testimony that is not in the case, because his own witness said that the meetings began a week before November 9 and were not in the slightest degree evidence of flight but were more or less arranged by appointment.

The Court: I think among other reasons it is evidential on the opportunity of identification. I will overrule the objection.

(R. p. 830)

Q. Where did you and Silvio go after Silvio registered, if anywhere?

Mr. McGlynn: Now I seriously object, your Honor. Your Honor said you thought the testimony might be admissible for the purpose of identification. Certainly they have seen one another long enough now so that any foundation for identification has been amply laid. If we are going into the details, from now on I say I will be seriously and substantially prejudiced.

The Court: I sustain the objection to that question.

Q. Now, did you see the defendant DeVita in his room that morning? A. Yes.

Mr. McGlynn: I object, if your Honor please. I don't see what difference it makes.

The Court: I overrule the objection.

Q. While you were in the defendant's room did you notice anything at that time?

Mr. McGlynn: I object, if your Honor please.

The Court: I overrule the objection.

Mr. McGlynn: The Prosecutor is bringing in indirectly that which he knows he cannot bring in directly.

(R. p. 831)

Q. Now, did you thereafter leave the hotel with the defendant DeVita?

Mr. McGlynn: The same objection.

The Court: Objection overruled.

A. Yes, in the morning.

(R. p. 832)

Q. After you had breakfast did you receive anything from the defendant, DeVita?

Mr. McGlynn: I object.

The Court: Objection overruled.

A. Yes, I did.

Q. How much? A. $100.

E. Prosecutor's Summation, Inflammatory Remarks—Statements of Unrelated, Unproven Crimes and of Matters Outside the Record.

(R. pp. 1115-1140)

Mr. Giuliano: Counsel have commented on the law as it refers to capital punishment. As I recall the law, being a former member of the legislature, the punishment originally for first degree murder was

death. At that time or many years later, there was an agitation that death should not be the punishment in every case. Then the legislature in its wisdom said: We will give the right to a jury, if they so feel upon and after a consideration of all the evidence, to recommend life imprisonment. This is not the type of case the legislature had in mind when it gave jurors the right upon and after a consideration of all the evidence to attach to their verdict of guilty of murder in the first degree a recommendation of life imprisonment.

(R. p. 1121) But what were Grillo and his associates doing while our boys are dying in Korea? He was riding back and forth from Florida, collecting souvenirs. What contributions is Grillo & Company making to democracy?

(R. p. 1124) Common knowledge amongst each other. The Associated Incorporated: Rosania, DeVita, Grillo, Cardone, Aulisi, Mucci, Angelo, Petrucci, Pontilla; the Associates Incorporated.

Why, they would stick you up, Mr. Juror No. 6, and you, Mrs. Garrabrant, and you, Mr. George. Talking about places. Yes, they would stick me up, because they don't care what position you hold; they have no respect for this uniform, no respect for the badge, no respect for enforcement agents.

Mr. Bozza referred in his summation and helped remind me: An arsenal locker, he said in his summation; an arsenal locker. That is just exactly what it was.

You and I, Mr. Gieser, start off with our brief cases in the morning with matters pertaining to our business. So did Grillo & Company, with a brief case carrying it through the streets with their tools which they were going to use in their business.

(R. p. 1125) First let me clear one thing here. Again I must say that it is a red herring. You recall in my opening I said that in this case each defendant is responsible for everything done by his confederates which reasonably follows in execution of that plan as one of the natural and probable consequences—and I want you to pay particular attention to this statement—even though the killing may not have been intended as part of the original plan or even though it was forbidden by one of them.

(R. pp. 1131-1132) Something has been said about life imprisonment. It has been mentioned that it means twenty-five years in State's Prison. The law provides that; but the law also provides that a man who is sentenced to life imprisonment can be given time off, and is entitled to it under the law. A man or a person sentenced to life imprisonment is subject to parole under our law after serving fourteen years and a few months.

Counsel says, "Give them a chance." Do you want to take a chance with them? Go ahead. Do you want them back in circulation after fourteen and a half years? Go ahead. Do you want to get rid of them forever? Return a verdict of guilty of murder in the first degree. Give Grillo a chance to go out again fourteen years hence? Give his associates the same chance? Why? What chance and what consideration did they give Jim Law? It is for you to answer.

(R. p. 1133) Now, are you going to believe Lofrano, or are you going to believe a member of Associates, Incorporated?

(R. p. 1137) Silvio DeVita hands her a hundred dollars.

(R. p. 1138) I think I have said enough. You have the exhibits. Selling and purchasing guns, which are a menace to the community, passing them around as if they were toothpicks, buying masks, bullets, preparing themselves, carrying this bag from place to place, as has been testified, pulling this daring stickup, during the height of the evening traffic, with no regard for authority, no respect for a uniform, interested in one thing, money, regardless of who gets hurt.

(R. pp. 1139-1140) Now, what are we going to do about it? Counsel said this is not deterrent or won't be any deterrent if you send these men to the chair. Well, I don't know anything that is more terrifying to the youth of America, to the youth of our community than to read at the end of this week, after the Court has charged you, *that three hoodlums,* three men who defied the law, who became desperadoes, walked down Broad Street with loaded revolvers, committed a murder, and the jury said to them, "Grillo, DeVita and Rosania, we'll show you as much consideration as you showed Law, and that's none. We'll be as merciful to you as you were to Jim Law."

I say your verdict can be a deterrent, your verdict can go from this building throughout the breadth of this county and say to all, young and old, "The citizens of Essex County will not tolerate hoodlums like you going around on our streets, taking the lives of decent citizens."

(R. p. 1140) This is the type of case that the Legislature had in mind when it said that persons convicted of first degree murder shall suffer death. *If you don't think so, thumb your nose at the Legislature. I don't care.* But if you believe in law and order, you will return a verdict of guilty of murder in the first degree against each and every defendant on trial. And I urge through your foreman, whoever he or she may be, that you will come out with your heads erect, look the defendants straight in the eye, and have the courage of your convictions, and that you will say to them, "We the members of this jury find you, Grillo, DeVita, and Rosania, guilty of murder in the first degree."

(R. p. 1117)

Let me say in all sincerity, ladies and gentlemen, that if I had recommended to this court the acceptance of a plea on a grandstand play that was made by counsel in this case and had been untrue to my trust, and you, Mr. Gieser (a juror) would have a right to criticize the prosecutor, Mr. Congleton, in recommending the acceptance of such a plea, and so would you, Mr. George, (a juror) and so would the newspapers, have a right to condemn and criticize not only myself, but the prosecutor of this county in recommending to this court the acceptance of a plea of *non vult* to a murder of this type. In my judgment the law would not permit it."

In dealing with the prosecutor's inflammatory remarks, note may be made of the collateral issue in the examination of the petitioner by the prosecutor introduced on the cross examination of the petitioner (R. p. 935).

By the Prosecutor:

Q. Why did you separate that evening? A. Because I was going to sleep with someone.

Mr. Giuliano: If your Honor please, I did not expect that answer. I move that it be stricken."

The striking thereof was proper but it indicated that the prosecutor knew that the answer was improper. In the summation of the prosecutor to the jury, (R. p. 1136) referring to Grillo and DeVita, the prosecutor stated,

> Then they went to the Moroccan Village Club. Conscience? Conscience-stricken? With two dames? You use your own inferences to what type they were.

F. Request to Charge, No. 41.

> DEVITA REQUESTS, No. 41 (R. p. 1172).
> If the evidence or lack of it leaves a reasonable doubt in your minds that Silvio DeVita had the criminal intent to commit robbery, then he is not responsible for the ensuing death of James Law and you must acquit him.

G. Court's Charge.

> (R. p. 1141)
> You will realize, of course, that there are three defendants on trial before you. As I shall explain to you in more detail later on, we are in effect *trying three cases in one*, and each defendant is entitled to your separate consideration and verdict. For that reason, except as I may otherwise specifically indicate, you will understand that the principles of law which I am about to explain to you apply severally and specifically to each defendant.
> (R. p. 1145) You will note that the statute *makes no mention of the element of the intention to kill in connection* with a killing which shall be committed in perpetrating a robbery. In cases where death ensues from the commission of a robbery, the commission of the robbery is regarded as standing in the place of, or as the legal equivalent of, the wilfulness, deliberation, and premeditation required under the statute, and therefore, the State is not under a duty to prove wilfulness, deliberation, and premeditation where it has proved that a killing has been committed during the perpetration of a robbery, which is the contention of the State in this particular case.

(R. p. 1149) As the evidence unfolded in this *case, certain facts seemed to be, if not admitted, seemed to be not controverted.* There was evidence to indicate that on Friday, November 9, 1951, shortly before 8 o'clock in the evening Thomas Lofrano was the manager and James Law was a special officer in uniform, employed in the Universal Market at 595 Broad Street in Newark; that Lofrano prepared the receipts of the day for deposit in the bank; that he put the receipts into a bag that was furnished by the bank for that purpose; that the receipts amounted to some $5100 in cash and some checks; that Lofrano in accordance with his usual custom put the bag furnished by the bank, a canvas bag, into a paper bag apparently to camouflage it and make it appear innocuous looking; and that when he had done that, he walked out of the store and behind him, as was the custom, followed James Law in uniform with a gun in his hand, apparently for the purpose of protecting Lofrano.

Lofrano got into the car at the right front seat and Law walked around the rear of the car and got into the left front seat, and two men appeared, one on each side of the car. There was a shot. Law collapsed over the wheel and was taken to the hospital and died at 10 minutes to 10. The two bandits made their escape with the bag of money and disappeared. No one identified the perpetrators of this act, and the police moved in with what must have impressed you with a very intensive investigation.

(R. p. 1153) Now, I have already indicated to you that under our law in this state, so far as the guilt or innocence of these defendants is concerned, *intent, premeditation to kill, is not an essential element.*

(R. p. 1157) A conspirator cannot escape responsibility for an act which is a natural result of a criminal scheme which he helped to devise and carry forward.

(R. pp. 1161-1162) The statutory punishment for first degree murder is death, subject only to the condition that the jury in its absolute discretion chooses to recommend imprisonment at hard labor for life; a recommendation that shall not be made, however, except after consideration of all of the evidence and by incorporating the recommendation in the verdict of guilty. If

that condition does not arise, the penalty is death, *determined not by the jury but by the statute* and pronounced by the Court. It is not correct to say that the jury imposes the sentence of death where it does not choose to make the recommendation for life imprisonment.

So Mr. Foreman and members of the jury, under the facts in this case as they are presented to you, you should bring in one of three verdicts as to each of the defendants, Silvio DeVita, Ralph Rosania and Joseph Grillo. They are either (1) guilty of murder in the first degree, or (2) guilty of murder in the first degree with a recommendation of life imprisonment, or (3) not guilty. You will understand, of course, that whichever of the three verdicts you arrive at as to each defendant must be the unanimous verdict of the jury.

You will recall that I mentioned previously *we are in effect trying three cases in one* and that each defendant is entitled separately to your consideration and verdict. Therefore the form of your verdict should be as follows, it being understood that your verdict as to each defendant, whatever it may be, shall be the unanimous verdict of the jury: We find the defendant Silvio DeVita guilty of murder in the first degree; or we find him guilty of murder in the first degree with a recommendation of life imprisonment, or we find him not guilty, as the case may be.

(R. p. 1163)

The Court: I have from the defendant DeVita some fifty requests to charge. Many of them I have included in my regular charge. However, the objection of counsel for DeVita will be noted on the record for the failure of the Court to charge each request specifically as requested.

(R. pp. 1163-1164) Mr. McGlynn, do you have any objection?

Mr. McGlynn: I have no specific objection except those which your Honor has already noted, except if I am correct we are allowed a general exception in our State practice.

The Court: I am afraid not, Mr. McGlynn.

Mr. McGlynn: There is no harm in asking.

The Court: Under the rules, No.

Mr. McGlynn: Let me make it anyhow.

Mr. Bozza: With regard to the general charge, I object to that part of your Honor's general charge wherein in quoting the law of robbery that results in a killing, when the robbery results in murder, your Honor stated that intent is not necessary. However, there is an omission with regard to intent being necessary in the crime of robbery itself, but not in its ultimate result.

(R. p. 1164) The Court: I think you are fully protected on the record with reference to the requests.

H. The Verdict.

(R. p. 1165) The Clerk: Mr. Foreman, how do you find?

The Foreman: We, the jury, find the defendant Silvio DeVita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree.

The Court: The court of its own motion will direct the clerk to poll the jury on the verdicts of the defendants Grillo and DeVita.

(The clerk polls the jury, and the verdict is affirmed.)

(The jury returns into the court room.)

I. The Verdict as recorded in the additional record.

The Clerk: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: We the jury find the defendant Silvio DeVita guilty of murder in the first degree; the defendant Ralph Rosania guilty of murder in the first degree, with a recommendation of life imprisonment; the defendant Joseph Grillo guilty of murder in the first degree.

The Court: The Court of its own motion will direct the clerk to poll the jury on the verdicts of the defendants Grillo and DeVita.

Additional Record not Included in the Transcript.

The Clerk: Ladies and gentlemen of the jury, harken to your verdict as the Court will have it recorded. You say by your foreman that you find the defendant Silvio DeVita guilty of murder in the first degree. You further say that you find the defendant Ralph Rosania guilty of murder in the first degree and recommend life imprisonment. You further say you find the defendant Joseph Grillo guilty of murder in the first degree.

By order of the Court the jury is to be polled.

You have heard the verdict as rendered by your foreman, wherein you say the defendants Silvio DeVita and Joseph Grillo are guilty of murder in the first degree. As the roll is called, you will answer by a yes or no answer whether this is your verdict or not.

Vito R. George.
Mr. George: Yes.
The Clerk: Earl G. Gieser.
Mr. Gieser: Yes.
The Clerk: George Hobby.
Mr. Hobby: Yes.
The Clerk: Ethel M. Grassle.
Miss Grassle: Yes.
The Clerk: Arthur Kuhnle.
Mr. Kuhnle: Yes.
The Clerk: Leonard L. Harmon.
Mr. Harmon: Yes.
The Clerk: Ralph M. Johnston, Jr.
Mr. Johnston: Yes.
The Clerk: Martha Garrabrant.
Mrs. Garrabrant: Yes.
The Clerk: Gerard Holzel.
Mr. Holzel: Yes.
The Clerk: Harold Leslie.
Mr. Leslie: Yes.
The Clerk: James A. Little.
Mr. Little: Yes.
The Clerk: William C. Gardner.
Mr. Gardner: Yes.

The Court: The defendants may be remanded until March 12 for sentence. That date will be tentative, depending on the Probation Office being ready.

III

Statement of the Questions Presented.

Whether the essential elements of fundamental fairness or due process assured to DeVita by Article I, Section 1, 10, of the New Jersey Constitution (1947) and the Fourteenth Article of the United States Constitution in the instant case were denied, when (a) rules promulgated under constitutional mandate by the Supreme Court of New Jersey which rules superseded legislative enactment having the validity of law are violated by police officials; and persons in authority; (b) a confession, the product of coninued, protracted interrogation, prolonged confinement, absence of bodily needs, psychological pressure and delayed arraignment is deemed voluntary or selfimpelled and evidential; (c) the theory of conspiracy to commit the crime of robbery adduced in the prosecutor's opening, proof in support thereof, at variance to the issue of the charge of homicide limited by the indictment in statutory form and the prosecutor's conflicting statements of law to the jury, proof of immoral activity, of unconnected, unrelated crimes collateral to the issue and after the event; prejudicial remarks beyond proper limitation, were allowed; (d) The trial court's rulings, comments, charge to the jury and instructions as to the jury's statutory function to resolve the issue of punishment; (e) the verdict of the jury, in uncertain, ambiguous terms, contrary to the court's charge and the law; and (f) the pronouncement of the sentence of death thereon, were sustained by the New Jersey Supreme Court.

IV

Reasons relied on for allowance of writ.

1. The Supreme Court of New Jersey decided a federal question of substance, "Whether there was a denial of due process or fundamental unfairness," in the trial of this case, which decision is not in accord with its own decisions, nor with the decisions of this court, and other courts set forth in the table of cases and, including the cases of:

Chambers v. State of Florida, 309 U. S. 227, 60 S. Ct. 216.

Carter v. State of Illinois, 329 U. S. 173, 67 S. Ct. 216.

Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

Harris v. South Carolina, 338 U. S. 68, 69 S. Ct. 1354.

Haley v. State of Ohio, 332 U. S. 596, 68 S. Ct. 302.

Lyons v. Oklahoma, 322 U. S. 596.

Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340.

Marsh v. State of Alabama, 326 U. S. 501, 66 S. Ct. 276.

Malinski v. N. Y., 324 U. S. 401, 65 S. Ct. 781.

Norris v. State of Alabama, 294 U. S. 587, 55 S. Ct. 579.

Palko v. Conn., 302 U. S. 319, 58 S. Ct. 149.

State v. Bunk, 340 U. S 839, 71 S. Ct. 25.

Stroble v. State of Cal. 343 U. S. 181, 72 S. Ct. 599.

Turner v. Com. of Pa., 338 U S. 62, 69 S. Ct. 1353.

Watts v. Indiana, 338 U. S. 49, 69 S. Ct. 1347.

Ward v. State of Texas, 316 U. S. 547, 62 S. Ct. 1139.

White v. State of Texas, 310 U. S. 530, 60 S. Ct. 1032.

Wolf v. People of Colorado, 338 U. S. 25, 69 S. Ct. 1359.

2. The Supreme Court of New Jersey decided the issues of:

(a) admissibility of confessions and validity of the trial court's instructions to the jury relevant to the confessions;

(b) admissibility of evidence;

(c) whether there was error in various portions of the trial court's charge to the jury;

(d) whether the prosecutor's remarks to the jury in his opening and summation were prejudicial, and (e) whether there was common error, which decision is not in accord with the provisions of the cited Fed. & State constitutions, the applicable principles of law formulated in the cases cited in the table of cases referred to herein, and public interest will be promoted by a prompt settlement thereof.

V

Statement of the ground upon which it is contended that the questions involved are substantial.

1. Although Article 14, sec. 1, United States Constitution, provides that,

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any persons within its jurisdiction the equal protection of the laws";

and, Article 1, 10 of the New Jersey Constitution (1947), provides that,

> "All persons are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness",

and

> "In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense;"

and, under Article 6, Section 2, paragraph 3 of the Constitution of New Jersey, (1947), the Supreme Court of said state has exclusive and plenary power to promulgate rules governing practice and procedure and did enact rules of criminal practice 2:3-3 (a), (b), (c), (appendix), designed to protect persons arrested and taken into custody from being held incommunicado for protracted periods of time, the violation of these rules, which have the force and effect of law, is an abridgment and deprivation of the aforestated constitutional privileges.

2. A ~~jurisdictional~~ judicial inquiry is required as to the constitutional validity of a conviction and sentence of death premised upon a confession of guilt, coerced under circumstances of prolonged incarceration, undue restraint, unwarranted delay in arraignment and preliminary examination, and grounded in a palpable disregard of due process.

3. The gravity of the prosecutor's inflammatory remarks, the confusion of issues, the proof of collateral, sub-

stantive unrelated criminal acts, disconcerted the jury in fair and free deliberation of arriving at a just and true verdict and contravened the fundamentals of fair play traditional in Anglo-American justice.

4. The rulings and charges of the trial court embodied prejudicial error, materially affected the jury's function to resolve the issue of punishment, contrary to the fundamental principles of our jurisprudence that no element of our judicial process must be more carefully protected than the functions of the jury.

5. The power to consign a human being to death is not to be founded on a verdict of doubtful inference, nor upon an uncertain, indefinite verdict, not in accord to the charge of the court, nor to the statute. A sentence of death should only be pronounced upon the return of the verdict of guilty of murder of first degree in certain and definite terms, unaccompanied by recommendations of life imprisonment. The imposition of the death sentence on the verdict in this cause is contrary to due process.

VI

Certified transcript of the record.

1. Petitioner presents to this court and files herewith as an exhibit hereto a duly certified transcript of the entire record in the case, as the same appears in the New Jersey Supreme Court.

VII

Additional record not included in the transcript.

1. In counsel's examination of the transcript (R. p. 1165) referring to the jury's verdict, the verdict appeared uncertain, vague and indefinite. Thereupon, counsel made an independent investigation and ascertained that when the jury was polled, the court stenographer took the jury's verdict. This verdict which is in the additional record did not appear in the examination of the transcript ~~(Tr. 1720)~~ (R. 1165) and it becomes the duty of counsel to make disclosure thereof this court, and thus it is annexed to this petition.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of New Jersey, to the end that the errors aforesaid may be corrected by this court.

Dated: April 15, 1953.

HARRY KAY,
Attorney for Petitioner, Silvio DeVita.

SUPREME COURT OF NEW JERSEY

No. A33 and A34 September Term 1952.

———o———

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOSEPH GRILLO,
Defendant-Appellant.

———o———

THE STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

SILVIO DEVITA and JOSEPH GRILLO,
Defendants-Appellants,

and

RALPH ROSANIA,
Defendant.

———o———

Argued November 3, 1952. Decided Dec. 15, 1952.

On appeal from Essex County Court, Law Division.

Mr. George R. Sommer argued the cause for the appellant, Joseph Grillo.

Mr. Edward R. McGlynn argued the cause for the appellant, Silvio DeVita. Mr. Joseph Weintraub, of counsel. Mr. Brendan T. Byrne, on the brief.

Mr. Edward Gaulkin, Essex County Prosecutor, argued the cause for the respondent. Mr. C. William Caruso, of counsel and on the brief.

The opinion of the court was delivered by

BURLING, *J.*

The appeals before us are brought by two defendants, each of whom was convicted by a jury of murder in the

first degree and sentenced to death. The defendants-appellants, Silvio DeVita and Joseph Grillo, together with one Ralph Rosania, were indicted for murder and subsequently were brought to trial together in the Essex County Court, Law Division. The theory of the State's case was that the defendants' crime was elevated to first degree murder under R. S. 2:138-2 (substantially reenacted in N. J. S. 2A:113-2), the killing having occurred during the course of a robbery. The jury brought in verdicts of guilty of murder in the first degree against each of the three defendants, and recommended life imprisonment as to Rosania. All were sentenced. Grillo and DeVita having imposed on them the death sentence, Grillo and DeVita have filed and argued concurrently separate appeals to this court from their respective judgments of conviction, but inasmuch as the major portion of the questions involved are identical we shall dispose of both appeals in this single opinion, Rosania did not appeal.

The facts surrounding the commission of the killing from which the prosecutions emanated appear to be uncontroverted. On the night of Friday, November 9, 1951, Thomas Lofrano the manager of a large food market in Newark, collected the receipts from the various departments of the market in a canvas deposit receptacle, locked it, and placed it in a brown paper bag. The sums thus contained were $5,161.21 in cash and $476.60 in checks. He and James Law, a uniformed special officer then left the market and entered Law's automobile, parked on the busy street on which the store fronted, for the purpose of taking the collected receipts to a bank for deposit. As Law was about to start the car, the door on Lofrano's side was opened, and DeVita, who was standing close to the side of the car, pointing a gun across Lofrano's stomach said "It's

a stickup." Grillo, also armed, opened the door on Law's side. Law raised his hands, there was a shot, Law slumped over the wheel and Grillo reached into the car and took the bag containing the day's receipts.

Both robbers escaped. Law died about 2 hours later in the hospital, without regaining consciousness. An investigation by the Newark police and the Essex County Prosecutor's office ensued, directed to the solution not only of the Law killing but of other then unsolved robberies in the area.

On November 13, 1951, at about 4:30 a. m. detectives who had been watching for Grillo, who was under suspicion as a result of information obtained by the police sought to apprehend him as he entered his home. He fled into the house, jumped from an upstairs porch into a neighbor's yard and was overtaken as he attempted to vault a fence. When he was taken to police headquarters it was discovered that his legs had been injured in the jump, and he was taken to a hospital for treatment (about 8 a. m.). At 1:00 p. m. on the same day he was returned to police headquarters for questioning. At about the same time, DeVita was apprehended elsewhere by detectives and taken to police headquarters. The police investigation also resulted in the arrest about 3:35 p. m. of Rosania, a former employee of the market whose property was the subject of the robbery during which Law was killed.

In the late afternoon of November 15, 1951, Rosania admitted his part in the robbery in which Law was killed and detailed to a police sergeant the planning of the robbery with Grillo and DeVita over a period of more than a month prior to the crime. On the basis of this information, DeVita and Grillo were again questioned, and each admitted his participation in the robbery and the killing of Law.

More evidence consisting of bags containing money was located by police where it had been hidden behind ceiling rafters in Grillo's home. Grillo was confronted with this evidence during his interrogation.

Following the oral admissions of the 3 suspects, on the night of the 15th of November, written statements were separately made by all three. The written statements were completed after midnight and all three of these defendants were brought together; each statement was read to them, and each (except Rosania—who requested an assistant prosecutor to read his aloud for him) read his own statement in the presence of the others. The statements contained details of the defendants' past association, planning and preparation for the robbery, perpetration thereof, and the facts subsequent thereto relevant to distribution of the spoils. All three were arraigned on a murder complaint (filed at about 11:00 p. m. on November 15th) on the morning of November 16, 1951.

On November 17, 1951, Grillo pointed out the approximate location in the Passaic River where he admitted he threw the murder weapon. It was recovered by the police on that day.

At their subsequent trial on the murder charge (after indictment) the defendants took the stand in their own behalf. Their testimony in substance verified their oral and written statements above mentioned. Grillo and DeVita contended that the actual shooting of Law was unintentional and accidental; Grillo, that the gun "went off" as he tried to cock it.

As hereinbefore recited, the trial resulted in the conviction of all three defendants of first degree murder, and Grillo and DeVita appealed to this Court.

The questions involved include (a) admissibility of the confessions of Grillo and DeVita and validity of the trial court's instructions to the jury relevant to the confessions; (b) admissibility of evidence; (c) whether there was error in various portions of the trial court's charge to the jury (hereinafter detailed); and (d) whether the prosecutor's remarks to the jury in his opening and summation were prejudicial to the rights of the defendants. Neither defendant asserts that his conviction was against the weight of the evidence.

The Confessions.

The first question involved herein is whether the Grillo and DeVita confessions were properly admitted in evidence, *i. e.*, whether they were voluntary.

Grillo's present contention is that his confessions and admissions were not voluntary because he was questioned "almost continuously" by the police and was denied adequate rest, food and care and was denied permission to communicate with family and counsel. DeVita makes substantially similar contentions. Neither alleged that there was any physical force, threat or promise made to induce his confession and both testified that no such abuses existed in this case.

Grillo's testimony was corroborative of that of police officers and other witnesses as to hospital care and other attention given him for his injured legs, including the provision of a wheel chair for his convenience. Both Grillo's and DeVita's testimony as to the sufficiency of food was vague and conflicting; and their testimony as to adequacy of rest was conflicting and negatived their allegations of incessant questioning. The remaining pertinent witnesses also negate their allegations. The answers given

by both of these defendants to leading questions respecting denial of permission to communicate with their families, friends and counsel were perfunctory. In these respects the other pertinent witnesses testified that there were no requests and consequently no denial of communication.

The legal questions here involved as to admissibility, and the voluntary character, of confessions and admissions, including effect of allegations of delay in arraignment, alleged denial of adequate rest, food and care, alleged denial of communication with family and friends, are substantially the same as those raised in the recent case of State v. Cooper, * * * N. J. ... (1952). The applicable principles of law relating to such questions have been fully discussed and marshalled in Mr. Justice Wachenfeld's Opinion in said case.

With respect to the allegations of denial of permission to consult counsel during the police interrogation the former Court of Errors and Appeals has expressly determined this alleged constitutional question, denial of counsel during the period between arrest and arraignment and its effect on a confession obtained during that period, adversely to the contentions here presented by the defendants, in State v. Murphy, 87 N. J. L. 515, 528-531 (E & A 1915). In State v. Murphy, *supra*, the court said:

> "The constitutional provision, whose protection is invoked, contemplates a criminal prosecution and provides for a speedy and public trial by an impartial jury, that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and (conjunctively) have the assistance of counsel for his defense. It clearly appears that the rights thus intended to be secured to a criminal defendant are rights arising from a criminal prosecution—that is, a trial upon an indictment. A prisoner making a confession is not con-

fronted with any witnesses, at least never in the sense that they are examined in his presence, he can have no process for witnesses in his favor upon such an occasion, and, consequently, he is not entitled to the assistance of counsel to save him from himself. That is done later by the trial court if the confession were unlawfully obtained." (Pages 530-531).

It was held in State v. Bunk, 4 N. J. 461, 470 (1950), cert. den. 340 U. S. 839, 95 L. ed. 615 (1950) that:

"* * * the law over the years in this State has been that a person is only entitled to counsel to aid him in his defense, not to save him from his own voluntary acts, State v. Murphy, 87 N. J. L. 515 (E & A 1915); State v. Cole, *supra*, * * *"

The ultimate test still remains—was the confession voluntarily made?

We find no error in the allegations of denial of due process, leveled at the confessions of the defendants and their introduction in evidence in this case was proper. The record shows marked spontaneity of attitude of the defendants to disclose the information in the confessions, as expressions of free choice and not the product of physical or mental ordeal or compulsion. There was no fundamental unfairness in the use of the evidence.

Further it has been held in State v. Cooper, *supra:*

"Whether a statement of confession is, in fact voluntary, depends on the facts of the individual case and the determination of the trial court will not be disturbed on appeal where the evidence is adequate to sustain it. State v. Cole, *supra;* State v. Pierce, *supra.*"

On the question of the trial court's instructions to the jury relative to the use of the confessions in their deliberations, there was no reversible error. In this respect the charge was in accord with the law of this state as settled in State v. Compo, 108 N. J. L. 499, 502-504 (E & A 1932).

Evidence.

The next questions involved have as their focal point the admissibility of evidence.

Defendants Grillo and DeVita both contend that 3 categories of evidence were improperly admitted namely (a) evidence indicating commissions of other offenses and criminal associations; (b) a gun, masks and paraphernalia of crime; and (c) events occurring after the event, suggesting sexual immorality. We find no error in the action of the court.

On the matter of the class of evidence such as the weapon, masks and other accoutrements of crime which were introduced and proved to have been in the possession, under the control of, or owned by the defendants there was no error. In re: State v. Hill, 65 N. J. L. 626, 632 (E & A 1900) it was held similar evidence was admissible where it would "in anywise show" the defendant's "state of mind and intent". An example of these principles concerned masks that were found in defendants' possession by police officers two months prior to a highway robbery. These were admitted at the trial of those defendants for the highway robbery, and this was held "no error justifying a reversal" in State v. Unger, 103 N. J. L. 18, 23 (Sup. Ct. 1926) aff'd 104 N. J. L. 448 (E & A 1928). In State v. Cerciello, 86 N. J. L. 309, 312 (E & A 1914) the former Court of Errors and Appeals stated:

> "The connection between the revolver and the whiskey bottle and the defendant's criminal attitude regarding the deceased, and his preparation for the commission of the deed were thus sufficiently evinced and connected as to make it apparent that both the articles were properly admitted in evidence as bearing upon the defendant's state of mind and the truth of his admissions."

> In State v. De Paola, 5 N. J. 1, 12 (1950), it was held: "* * * where there is a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, evidence thereof is admissible, and such evidence does not fall under the condemnation of testimony relative to other offenses than the one for which the defendant is on trial."

The incidental disclosure of other offenses and criminal associations which were brought to light by the introduction of the evidence of which the defendants complain, under the circumstances of this case, was not error.

The evidence of matters subsequent to the robbery-killing was admissible to prove the distribution of spoils of the robbery. United States v. Jackskion, 102 F. 2d, 683, 123 A. L. R. 116 (C. C. A. 2, 1939), cert. den. 307 U. S. 635, 83 L. ed. 1517 (1939); 2 Wharton's Criminal Evidence (11th ed. 1935) sec. 746, p. 1258; 2 The Law of Arrest, Alexander (1949) sec. 385, pp. 1215-1217; 22 C. J. S., Criminal Law, sec. 636, p. 974. And the fact that the evidence incidentally disclosed immoral activity does not require its exclusion.

Prosecutor's Remarks.

It is asserted in the questions involved that the defendants' rights were prejudiced by the comments of the prosecutor.

Both Grillo and DeVita urge as a ground for reversal the allegedly inflammatory remarks of the prosecutor, expressed in the opening, the summation and during the course of the trial. The State observes that there was no application made for a mistrial or request to the trial court to instruct the jury to disregard the statements.

The remarks were to the effect that these defendants were members of an organized criminal group and that

the statute providing for recommendation of life imprisonment was not intended to apply to defendants such as these defendants.

The canons of professional ethics restate a legal theorem that the primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done (Canon 5). However, the prosecutor was charged by statute as follows:

> "Each prosecutor of the pleas shall be vested with the same powers and subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and *he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws.*" (emphasis supplied). R.S.2:182-5 (see also L. 1948, c. 54, p. 141, sec. 1, N. J. S. A. 2:182A-1). Compare N. J. S. 2A:158-5.

It was his duty to prosecute with earnestness and vigor circumscribed with the obligation to refrain from improper methods. Though the statements were strong and forceful and the language used in referring to legislative intent was crude, the prosecutor confined himself to the evidence. Viewed in the light of the charge of the trial court they do not constitute ground for reversal. Cf. State v. Tansimore, 3 N. J. 516, 534-536 (1950); State v. Continental Purchasing Co., Inc., 119 N. J. L. 257, 263 (Sup. Ct. 1938), aff'd 121 N. L. L. 76 (E & A 1938); State v. Hauptmann, 115 N. J. L. 412, 416-417 (E & A 1935) cert. den. 296 U. S. 649, 80 L. ed. 461 (1935).

Charge of the Court.

(1) A further question involved is grounded in the trial court's failure to charge the jury that intent is an element of robbery. Defendant DeVita contends that the trial court erred in refusing to instruct the jury with DeVita's 41st request to charge, which reads as follows:

> "41. If the evidence or lack of it leaves a reasonable doubt in your minds that Silvio DeVita had the criminal intent to commit robbery, then he is not responsible for the ensuing death of James Law and you must acquit him."

DeVita argues that intent to commit robbery is an essential element of this case and therefore the refusal to charge his 41st request constituted prejudicial error. The State admits that felonious intent is an essential element of the crime of robbery but argues that it was not necessary to instruct the jury in the language requested by DeVita.

It is axiomatic that the trial court need not charge in the exact language requested, and that the defendant has no right to choose the language in which the court should state the pertinent instructions, provided the subject matter of the request has been fully and correctly covered. State v. Ellrich, 10 N. J. 146, 154 (1952). Upon this settled principle alone the denial of DeVita's request No. 41 was proper. In addition to the fact that the language of the request failed to confine the intent to the robbery alleged in this case, the trial court's instructions fully covered the subject matter. The court charged:

> "In this case the state contends that all three defendants aided and abetted in the robbery perpetrated upon James Law. The state further contends that during the perpetration of the robbery, James Law was shot and killed by the defendant Grillo. That contention of course raises the question of the criminal responsibility of the defendants DeVita and Rosania if you find beyond a reasonable doubt that they, or either of them aided or abetted the robbery."

and further charged:

> "* * * it makes no difference that DeVita did not fire the shot that killed James Law, nor that Ralph Rosania was not at the scene of the actual killing if you find beyond a reasonable doubt that either or both of them as the case may be, aided and abetted in the planning of the robbery * * *"

In State v. Turco, 99 N. J. L. 96, 102-103 (E & A 1923) the former Court of Errors and Appeals stated:

> "The trial court charged the jury that the effect of the statute which provides that if, in an attempt to commit robbery, one man, or any number of men, kill another, even though they did not start with that purpose in mind, but with the single purpose of robbery, their act, in such circumstances, is denominated murder. This was correct * * *"

The same elements are present, though couched in different language in the present case.

We fail to perceive how their could be any possible confusion in the jury's mind as to their duty to find beyond a reasonable doubt that the defendant DeVita had a criminal intent to commit the robbery alleged. We find no error in the trial court's charge in this respect nor in its refusal to repeat the instructions in the specific language of the DeVita request.

And there seems to have been no claim on DeVita's behalf that he did not intend to commit the robbery, for his counsel, in his remarks in summation to the jury stated:

> "The first part of your verdict, as far as I am concerned, you do not have to take much time about * * * It would be an insult to your intelligence, and it would be ridiculous on my part, so far as my client is concerned, to even suggest that he should be acquitted."

In view of the foregoing it is difficult to comprehend in what respect the trial court's failure to charge as requested, if it had been error, could have been deemed prejudicial to the rights of this defendant.

There is persuasive authority that the action of the trial court was not error. In the case of State v. Boccadoro, 105 N. J. L. 352, 358 (E & A 1929) the trial court instructed the jury that the uncontroverted facts proved in the case showed that the decedent came to his death as the result of a bullet fired into his body by a person who had forced

his way into the decedent's house in an attempt to commit burglary, and then charged "Now, gentlemen, the question which you must decide in this case is simply this: Did Boccadoro kill Thompson?" The former Court of Errors and Appeals, affirming Boccadoro's conviction, held (105 N. J. L. at p. 358):

> "Taking the two statements, together, the law upon this question was correctly expounded to the jury, the meaning of the instruction being that, as it was practically conceded that the killing was done by a man attempting to commit a burglary, the only question left for determination was whether the defendant was or was not that man."

Further in State v. Lyons, 70 N. J. L. 635, 645 (E & A 1904) it was held that a proper definition of the crime of robbery in a murder trial based on that theory was:

> "Robbery is stealing property with violence from the person or personal custody of another person. It is necessary, in order to constitute that crime, that the goods shall be on the person of the owner, or the owner's agent, or shall be in his presence and in his custody."

The trial court in the present case charged the jury in similar language. Compare the statutory definition contained in R. S. 2: 166-1 and N. J. S. 2A: 141-1. The former Court of Errors and Appeals approved the charge in the Lyons case quoted *supra*, as applicable to either the statutory or common law crime of robbery in a felony-murder case, in State v. Compo, *supra* (108 N. J. L. at pp. 500-501). In this respect the Compo case was later expressly followed by the same court in State v. Jones, 115 N. J. L. 257, 263-264 (E & A 1935). Cf. State v. Mule, 114 N. J. L. 384, 390, 396 (E & A 1935).

It has even been held that where commission of robbery is an undisputed fact it is unnecessary to instruct the jury to find the specific intent to commit the crime. See State v. Caruso, 6 N. J. Misc. 112, 114 (Sup. Ct. 1928),

aff'd sub nom. State v. Legenza, 106 N. J. L. 600 (E & A 1929). Cf. 77 C. J. S., Robbery, sec. 49 b(7), pp. 514-515.

(2) Defendant Grillo contends that the trial court erred in refusing to charge the text of the statute relative to the acceptance and effect of a plead of *non vult.*

The record shows that at the close of the trial, after all the parties had rested but in the absence of the jury counsel for Grillo informed the trial court that prior to trial the prosecutor told him he would seek the death penalty and would not recommend acceptance of a plea to the indictment; counsel for Grillo and DeVita sought leave of the court to withdraw the previous plea of not guilty and to enter a plea of *non vult.* The State opposed these motions, and the trial court, exercising its statutory discretion denied them and declined to accept the plea. The only references to this procedure before the jury were made by counsel for Grillo and DeVita in their respective summations, during the course of which both counsel practically conceded their respective clients' guilt of offense charged.

To have charged as requested by Grillo might well have been adverse to the defendants, for the jury might have unjustifiably inferred from the requested instruction that where the court had refused the acceptance of the plea the jury should not make a recommendation of life imprisonment. We find no error in the trial court's refusal to instruct the jury as requested in this respect.

(3) Among these questions on the charge is the assertion, made on behalf of each of the appealing defendants, that the trial court erred in restricting the jury, as to each defendant, to one of two verdicts: guilty of murder in the first degree (with or without recommendation) or acquittal. The defendants argue that the trial court erred in failing to charge on second degree murder. As the

State contends, neither Grillo nor DeVita submitted a request to charge in this respect, nor pointed out to the trial court their objections to this alleged error. Rule 2: 7-8(b). But it is unnecessary to rest our determination upon the technical requirements of the Rules. The precise question has been determined adversely to these defendants' contentions in State v. Bunk, 4 N. J. 461, 474, 475 (1950), cert, den. 340 U. S. 839, 95 L. ed. 615 (1950). And it is firmly settled in our law that such a charge, directing the jury to bring in a verdict either of guilty of murder in the first degree or of acquittal is not error under circumstances such as existed in this case. See for example State v. Young, 67 N. J. L. 223 (E & A 1902); State v. Palmieri, 93 N. J. L. 195 (E & A 1919); State v. Martin, 94 N. J. L. 139 (E & A 1920); State v. James, 96 N. J. L. 132 (E & A 1921); State v. Carlino, 98 N. J. L. 48 (Sup. Ct. 1922), aff'd 99 N. J. L. 292 (E & A 1923).

(4) Another portion of the charge to which our attention is directed dealt with subject of recommendation of life imprisonment. This subject was covered at length by the trial court. His remarks conclude with two sentences to which both Grillo and DeVita object, namely:

> "* * * If that condition does arise, the penalty is death, determined not by the jury but by the statute and pronounced by the court. It is not correct to any that the jury imposes the sentence of death where it does not choose to make the recommendation for life imprisonment."

These defendants admit that they raised no objection to this language (see Rule 2: 7-8(b) *supra*) but contend that it constitutes an obvious error on the face of the record and therefore is reviewable under Rule 1:2-19(a). It is the function of the jury to adjudge the degree of guilt and for the court to pronounce the sentence. The court properly advised the jury as to its obligation and duty after having arrived at the degree of guilt then to de-

termine, upon and after the consideration of all the evidence, whether to mitigate the death sentence. The form of verdict to pronounce that judgment was accurately explained. The phrases charged here have been expressed as the law of this State, State v. Bunk, *supra,* (4 N. J. at p. 475); State v. Cordasco 2 N. J. 189, 201, 202 (1949). In the Cordasco case, *supra,* it was indicated that a charge in such language would have been proper.

In the present case the trial jury obviously was not misled by the quoted instruction for it made the recommendation as to Rosania, the third defendant, who has not appealed. Under all the circumstances and the charge as a whole we are of the opinion that no error prejudicial to the substantial rights of either of the defendants was committed by the trial court in this connection.

(5) Defendant DeVita argues for reversal upon the further ground that the trial court erred in refusing to charge his request No. 49 as to the right of jurors to change their vote at any time. The trial court had instructed the jury in this respect in its general charge and, we find, sufficiently so. It is not necessary that the instruction be couched in terms requested where the law has been correctly charged in other language. State v. Ellrich, *supra.*

CONCLUSION.

On the trial of this case the defendants suffered no manifest wrong or injury in the admission or rejection of evidence, in the charge of the court, or in any matter touching the conduct of the trial and no error intervened which prejudiced either defendant in maintaining his defense upon the merits.

For the reasons expressed in this opinion the judgments below are affirmed.

SUPREME COURT OF NEW JERSEY

Nos. A-33 and A-34 September Term, 1952.

———o———

THE STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

JOSEPH GRILLO,
Defendant-Appellant.

——o——

THE STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

SYLVIO DEVITA,
Defendant-Appellant.

———o———

HEHER, *J.*, dissenting.

I do not concur in the view that the trial judge in substance charged the jury that "a criminal intent to commit robbery" was an essential ingredient of the statutory offense of murder in the first degree laid to the accused in the indictment, and so the request for an instruction in this regard interposed by the defendant DeVita was properly refused as unnecessary, and that, at all events, the question of intent was not at issue, for there was "no claim on DeVita's behalf" in the opening statement to the jury made by his counsel "that he did not intend to commit the robbery."

The judge instructed the jury that "the statute makes no mention of the element of the intention to kill in connection with a killing which shall be committed in perpetrating a robbery," and in cases "where death ensues from the commission of a robbery, the commission of the

robbery is regarded as standing in the place of, or as the legal equivalent of, the wilfulness, deliberation, and premeditation required under the statute, and therefore the state is not under a duty to prove wilfulness, deliberation, and premeditation where it has proved that a killing has been committed during the perpetration of a robbery." But there was no reference whatever to the indispensable requisite of an intent to commit the basic crime of robbery and of DeVita's participation in that intent, if the offense was to constitute murder in the first degree.

The State differentiates in this regard between proof of a robbery as the substantive offense charged and murder in the commission of a robbery. Conceding that in the former case "felonious intent" is an element of robbery to be proved, the insistence is nevertheless that in the latter case proof of "wilful intent to kill, deliberation and premeditation is dispensed with, and in its place is substituted the proof of the *commission of the robbery.*" (Italics the State's) I do not perceive the distinction. Where it is charged that the killing was done in the perpetration or attempted perpetration of one of the enumerated statutory felonies, proof of an intent to kill, deliberated and premeditated, is of course unnecessary; but, by the same token, it is requisite that there be proof of an intent to commit the underlying statutory offense.

The State had the burden of proof of all the essential elements of murder in the first degree; and, while a murder committed in the perpetration or attempted perpetration of a robbery is murder in the first degree under the statute, irrespective of the intent and mental operations otherwise essential to an offense of that degree, proof of the "commission of the robbery" *ex necessitate* involves the felonious intent which is a constituent of that offense. It would

seem to be axiomatical truth that there cannot be a conviction of murder in the first degree for a killing in the perpetration or attempted perpetration of an offense of the statutory class, unless all the elements of the basic crime be established as on the trial of an indictment for that offense alone.

I shall not consider whether in the particular circumstances the ruling was prejudicial. There are other grounds for reversal, common to both of the accused, which I deem to be well founded.

The trial judge charged the jury that, if there be no recommendation of life imprisonment, "the penalty is death, determined not by the jury, but by the statute and pronounced by the court. It is not correct to say that the jury imposes the sentence of death where it does not choose to make the recommendation for life imprisonment."

This suggests that the jury is under no duty affirmatively to determine which of the alternative punishments, death or life imprisonment, shall be inflicted, and thereby unduly modifies the jury's responsibility in this behalf under the rule of R. S. 2:138-4, now superseded by N. J. S. 2A:113-4.

There is laid upon the jury the duty "to determine, within the limits fixed by the statute, what" the accused's "punishment shall be." State v. Rombolo, 89 N. J. L. 565 (E. & A. 1916). The jury are made the final arbiters of the punishment; that tribunal exercises judgment and discretion based on the evidence. The choice is the jury's; but a choice there must be. State v. Cooper, 2 N. J. 540 (1949). I reiterate the views expressed in my dissenting opinion in State v. Bunk, 4 N. J. 461 (1950).

And, on the crucial issue of whether the judgment should be death or life imprisonment, the trial prosecutor in his closing argument transgressed the substantial rights of the accused under the statute. He said:

> As I recall the law, being a former member of the legislature, the punishment originally for first degree murder was death. At that time or many years later, there was an agitation that death should not be the punishment in every case. Then the legislature in its wisdom said: We will give the right to a jury, if they so feel upon and after a consideration of all the evidence, to recommend life imprisonment. This is not the type of case the legislature had in mind when it gave jurors the right upon and after a consideration of all the evidence to attach to their verdict of guilty of murder in the first degree a recommendation of life imprisonment.
>
> This is the type of case that the Legislature had in mind when it said that persons convicted of first degree murder shall suffer death. If you don't think so, thumb your nose at the legislature. I don't care. But if you believe in law and order, you will return a verdict of guilty of murder in the first degree against each and every defendant on trial.

This served to deny the accused the essence of a fair trial of the issue of life or death as the punishment for the crime of which they were convicted, such as was within legislative contemplation. Thereby, the prosecutor drew upon his experience as a legislator for a legislative intention that is not to be found in the enactment itself. He declared that the instant case was not within the class the Legislature had in view; *e contra*, that the Legislature had death "in mind" for cases of this type, and "If you don't think so, thumb your nose at the Legislature." It was the natural tendency of this argument, ill founded in fact as it was, to coerce the jury into prescribing death as the punishment supposedly to conform to the legislative

intention and thus avoid public approbrium for not doing so.

There was fundamental unfairness in this assessment of the jury's statutory function to resolve the issue of punishment, such as in all human likelihood operated to deprive the accused of the essential benefit of the statutory rule. The accused is entitled to a fair trial and to the ungrudging application of statutory policy for determining the punishment. In the words of Cardozo, C. J.: "A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law." People v. Moran, 246 N. Y. 100, 158 N. E. 35 (Ct. of App. 1927). There is all the more reason for fairness where the issue is that of life or death.

I would reverse the judgment and direct a new trial of the issue.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1952

Docket No.

———o———

SILVIO DEVITA,

Petitioner,

vs.

STATE OF NEW JERSEY.

———o———

BRIEF OF APPELLANT, SILVIO DE VITA.

(All italics mine.)

I

Opinions of the Court below.

The opinions of the New Jersey Supreme Court are reported in State v. Grillo, State v. DeVita, Grillo and Rosania, 11 N. J. 173, Advance Sheet Report No. 7, dated February 16, 1953 and are set forth at length in (R. pp. 1188-1209).

II

Jurisdictional Statement.

1. The date of the judgment to be reviewed is December 15, 1952. An order extending the time for filing the petition for writ of certiorari to April 20, 1953 was allowed by this court on February 25, 1953.

2. The statutory provision which sustains the jurisdiction of this court is Title 28 U. S. C. A., Sec. 1257 (3).

3. The nature of the case, the rulings below and statement of facts and references thereto in the record to bring this case within the jurisdictional provision relied on have been set forth and are stated in the preceding petition for review by certiorari under I (pp. 1-3), under II (pp. 3-7), under II (b) (pp. 7-35), which are hereby adopted and made a part of this brief.

4. The cases believed to sustain said jurisdiction are as follows:

Andres v. U. S., 333 U. S. 740, 68 S. Ct. 880 (1946).

Akowskey v. U. S., 158 F. 2d 649 (1946).

Betts v. Brady, warden, 316 U. S. 455, 62 S. Ct. 1252 (1942).

Carter v. State of Illinois, 329 U. S. 173, 67 S. Ct. 216 (1946).

Chambers v. State of Florida, 309 U. S. 227, 60 S. Ct. 472 (1940).

Gros v. U. S., 135 F. 2d 878 (1943).

Garner, *et al.* v. U. S., 174 F. 2d 499 (1949) 69 S. Ct. 1502.

Gallegos v. State of Nebraska, 342 U. S. 55, 72 S. Ct. 141 (1951).

Harris v. State of South Carolina, 338 U. S. 68, 69 S. Ct. 1354 ( ).

Malinski v. State of N. Y., 324 U. S. 401, 65 S. Ct. 781 (1945).

Ochoa v. U. S., 167 F. 2d 341 (1948).

People v. Mummiani, 258 N. Y. 394 (1932).

U. S. v. Carignan, 342 U. S. 36, 72 S. Ct. 97 (1951).

Upshaw v. U. S., 334 U. S. 410, 69 S. Ct. 170 (1948).

Refoule v. Ellis, 74 F. Supp. 336 (1947).

Stroble v. State of Cal., 343 U. S. 181, 72 S. Ct. 599 (1952).

Turner v. Pennsylvania, 338 U. S. 62, 69 S. Ct. 1352 (1949).

Vernon v. State, 196 Southern R. 96 (1940).

Wolf v. People of Colorado, 338 U. S. 25, 69 S. Ct. 1359 (1949).

Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347 (1949).

Ward v. State of Texas, 316 U. S. 547, 62 S. Ct. 1139 (1942).

III

Statement of the case.

1. This has already been stated in the preceding petition for review by certiorari under I (pp. 1-3) of said petition, which is hereby adopted and made a part of this brief.

IV

Specification of errors.

The Supreme Court of the State of New Jersey erred in holding that,

(a) There was no denial of due process and the confession was properly admitted in evidence;

(b) Evidence indicating commissions of other offenses and criminal associations and events occurring after the event, suggesting sexual immorality, was properly admissible in evidence;

(c) DeVita's rights were not prejudiced by the inflammatory remarks of the prosecutor to the effect that defend-

ants were members of an organized criminal group and that the statute providing for recommendation of life imprisonment was not intended to apply to DeVita, expressed in the opening, the summation and during the course of the trial.

(d) The trial court committed no error in refusing to charge the jury that intent is an element of robbery (DeVita's request to charge No. 41), and the trial court's charge to the jury which dealt with the subject of recommendation of life imprisonment was proper;

(e) DeVita suffered no manifest wrong or injury in the admission or rejection of evidence, in the charge of the court, or in any matter touching the conduct of the trial and no error intervened which prejudiced DeVita in maintaining his defense upon the merits.

Argument.

Summary of Argument.

POINT A—Under the New Jersey Constitution, the Supreme Court of New Jersey is authorized to make rules governing the administration of all courts in the state, and it did make rules of criminal practice requiring an arresting officer to take an accused without unnecessary delay before a magistrate so that the magistrate may inform the accused of his right to a preliminary examination, and under the New Jersey Constitution and the Federal Constitution due process must be observed; yet notwithstanding the aforegoing, the petitioner DeVita was not taken before a magistrate as so required, was deprived of rest, food, continuously interrogated for 64 hours, deprived of his right to contact members of his family, counsel or anyone, and by mental oppression, the prosecuting authorities secured from him a confession which was used at the trial, all of which is contended, as herein set forth, a denial of that due process of law and an abridgment of his rights, secured to him under both the state and federal constitutions. The deten-

tion without arraignment, the exclusive control of the accused by the authorities, the systematic interrogation, the violation of the criminal rules of procedure, promulgated under the constitutional mandate. The conditions under which the confession was secured, long hours of uninterrupted grilling, mental duress, constant pressure is without legal sanction and ought to be condemned.

POINT B—The introduction of the commission of other offenses, criminal associations and events suggesting sexual immorality being unrelated to the charge of homicide, the reasonable inference arises that proof thereof was placed in evidence to infect the atmosphere in such manner that a charge of the court could not eradicate the same from the minds of the jurors. The atmosphere so created did not lend to that fundamental fairness required by the Federal and State Constitutions under due process.

POINT C—The prosecutor's statements in the opening, during the course of the trial and in the summation of matters of his own personal knowledge, unsupported by any proof, his inflammatory remarks that the defendants were members of an organized criminal group and that the statute providing for recommendation of life imprisonment was not intended to apply to DeVita was highly prejudicial and a direct violation of the rights, privileges and immunities of the accused under the Federal and State Constitutions. The prosecutor's remarks were unrelated to nor could reasonably be inferred from the proof. DeVita has the right to a fair trial, which means a trial conducted in all material things, in substantial conformity to the law. The prosecutor should have confined himself to a discussion of the facts disclosed by the evidence or legitimate inferences deducible therefrom. The prosecutor should not have appealed to prejudice nor should he have been permitted to argue on issues of law. His argument invaded the province and functions of the jury and the province and function of the court.

POINT D—In a criminal case, it is the duty of the court to instruct on all essential questions of law whether requested or not. The refusal to charge an essential element of a crime under the statute and in so charging the jury on the subject of recommendation of life imprisonment is

prejudicial error in the instant case. The jury ought not to have been allowed to judge which is right between conflicting statements of law nor should the trial court have told the jury that certain facts seemed to be, if not admitted, not controverted, as this deprives an accused of the presumption of innocence, and such a charge substantially deprived DeVita of a fundamental right. The court's statement to the jury that, "It is not correct to say that the jury imposes a sentence of death where it does not choose to make a recommendation for life imprisonment", defeated the legislative purpose which assigned to the jury the determination of the question of which of the alternative punishments should be exacted where guilt is established. The charge interfered with the choice of the jury and there was fundamental unfairness in the assessment of the jury's statutory function to resolve the issue of punishment. The right of DeVita to the jury's exercise of its sole judgment and conscience was invaded.

POINT E—The indictment was for statutory homicide and not for conspiracy. Homicide and conspiracy are each substantive crimes. Allowing the prosecutor to make a statement as to the law to the jury, which statement pursued a theory of conspiracy in conflict with the charge of the indictment, is prejudicial error, confusing to the jury and placed upon the jury the burden of determining between conflicting statements of law. The jury were directed to bring in three separate verdicts. The verdict of the jury was contrary to the charge of the court and the law and is indefinite, void, vague and uncertain. The pronouncement of the sentence of death upon such verdict is without authority and the court did not have jurisdiction to pronounce such sentence. Common error appearing on the face of the record, the constitutional rights, privileges and immunities of DeVita were not accorded to him as required and he was deprived of due process in the entire proceedings.

POINT A

There was a denial of due process and the confession was improperly admitted in evidence.

The due process clause of the Fourteenth Amendment requires that action by the state through any of its agencies must be consistent with the fundamental principles of liberty and justice. Where this requirement has been disregarded, this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee.

The rulings of the trial court and the findings of the jury do not foreclose the duty of this court to study the record and make an independent examination and judicial review to determine the constitutional validity of the conviction and to exercise its judgment upon the whole proceedings to ascertain whether they offend those canons of decency and fairness which express the notions of justice even toward one charged with the commission of homicide.

Under Article I, Sec. 1, 10 of the New Jersey Constitution (1947), all persons have certain natural and unalienable rights of enjoying and defending life and liberty, of pursuing and obtaining safety and happiness, and in all criminal prosecutions the right to have a speedy and public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses, and to have the assistance of counsel in his defense; which rights are set forth in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In re: Palko v. Conn., 302 U. S. 319, 58 S. Ct. 149, Mr. Justice Cardozo stated the rule to be that,

> "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, but in so doing it must not offend some principle of

> justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. The freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law."

Under Article 6, Sec. 2, par. 3, Constitution of New Jersey (1947), the Supreme Court is authorized to make rules governing the administration of all courts in the state, and pursuant thereto the Supreme Court of New Jersey did promulgate Rules of Practice 2:3-3 (a), (b), (c), requiring an officer making an arrest to take the arrested person, "without unnecessary delay" before the magistrate named in the warrant, if a warrant issued, or before the nearest available magistrate if a warrant did not issue and directing a complaint to be filed forthwith and the magistrate to inform the defendant of the complaint against him, of his right to retain counsel, of his right to have a preliminary examination, to allow the accused a reasonable time and opportunity to consult counsel, the right to a preliminary examination and the right to cross-examine witnesses against the accused. The arraignment to be conducted in open court and to consist of reading the indictment or accusation or stating the substance thereof to the accused, giving him a copy thereof so that he may plead thereto.

In re: Ochoa v. United States, 167 F. 2d 341, it was stated:

> "The federal rules of criminal procedure have the effect of law".

Likewise, it would appear that the rules of the court of the State of New Jersey established pursuant to the constitutional mandate has the "effect of law".

Prior to the foregoing rules, under the statute, R. S. 2:216-9, (appendix) (not now in effect), an accused, on the order and commitment of a justice for examination could

be detained for any period not exceeding 48 hours. The rules were intended to supersede the statute. To remedy the evils thereof.

Rule 5 (a), (b) of the Federal Rules of Criminal Procedure, which this court has continuously enforced is similar to Rule 2:3-3 (a), (b), (c) of the New Jersey Rules of Criminal Procedure and requires an officer making an arrest under a warrant or without a warrant to take the arrested person, "without unnecessary delay", before the nearest available commissioner or before any other nearby officer—and a complaint shall be filed forthwith—and the commissioner must inform the accused of the complaint, of his right to retain counsel, of his right to have a preliminary examination, and of the right of the accused not to make any statement and that any statement made may be used against the accused. The New Jersey rules, go a step further and allow the accused the right to cross-examine witnesses at the preliminary examination.

In re: United States v. Carignan, 342 U. S. 36, 72 S. Ct. 97, Mr. Justice Reed, who delivered the opinion of the court declared that,

> This court in recent years has enforced judicially created federal rule of evidence, to which the label "McNabb Rule" has been applied, that confessions shall be excluded if obtained during "illegal detention" due to failure promptly to carry a prisoner before a commiting magistrate, whether or not the "confession is the result of torture, physical or psychological", and that, in "U. S. v. Mitchell, 322 U. S. 65, 64 S. Ct. 896, this court decided that the McNabb Rule was not intended as a penalty or sanction for violation of the commitment statute, nor of Rule 5 Federal Rules of Criminal Procedure."

(However, Carignan had been arrested and committed for an assault perpetrated six weeks after the murder and his detention therefor was legal). Mr. Justice Douglas with

whom Mr. Justice Black and Mr. Justice Frankfurter joined, concurred in the setting aside of the conviction, stated,

> "I agree that the judgment of conviction was properly set aside. But my reason strikes deeper than the one on which the court rests its opinion. There are time-honored police methods for obtaining confessions from an accused. One is detention without arraignment, the problem we dealt with in McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608. Then the accused under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient. In the McNabb case we tried to rid the federal system of those breeding grounds for coerced confessions.
>
> "Another time-honored police method for obtaining confessions is to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime. This is an easy short cut for the police. How convenient it is to make detention the vehicle of investigation! Then the police can have access to the prisoner day and night. Arraignment for one crime gives some protection. But when it is a pretense or used as the device for breaking the will of the prisoner on long, relentless, or repeated questionings, it is abhorrent. We should free the federal system of that disreputable practice which has honeycombed the municipal police system in this country. We should make illegal such a perversion of a 'legal' detention.
>
> "The rule I propose would, of course, reduce the 'efficiency' of the police. But so do the requirements for arraignment, the prohibition against coerced confessions, the right to bail, the jury trial, and most of our other procedural safeguards. We in this country, however, early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police."

In re: Winberry v. Salisbury, 5 N. J. 240, the Supreme Court of New Jersey stated:

> "Article 6, sec. 2, par. 3 of the New Jersey Constitution serves as a continuous reminder that the rule-making power as to practice and procedure must not invade the field of the substantive law as such and while the courts necessarily make any substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power;"

And *in re:* Siegler Co. v. Norton, 8 N. J. 374, the Supreme Court of New Jersey, under Article 6, Sec. 2, par. 3 of the Constitution of 1947, stated:

> "The statute R. S. 48:12-83, wherein there was left to the jury to determine whether a person was exercising due and reasonable care under the conditions existing at a railroad crossing at the time of injury or death and if the jury shall determine that the person injured or killed was not exercising due and reasonable care, the verdict shall be against the plaintiff,"

was in conflict with, either directly or by necessary implication, the rule-making power of the court, was wholly procedural in its operation, and the rule superseded the statute. By the same token, it can be concluded that Rule 2:3-3 (a), (b), (c) of Criminal Practice supersedes any statute in conflict therewith and is deemed to be the law. In any event, the duty of maintaining the constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it should refuse to sanction such violation and apply the corrective. Under Article 6, Cl. 2 of the United States Constitution, the Constitution and the law of the United States made pursuant thereof is the supreme law of the land and the judges in every state are bound thereby.

The delay in taking De Vita before a judicial officer was for purposes inimicable to the letter and spirit of the rules of the court requiring an officer making an arrest to take the arrested person, "without unnecessary delay" before

a magistrate so that he may be informed of the nature of the charge, the right to the witnesses and the right to cross-examine the witnesses, the right to retain counsel and the right to a preliminary examination. All of these rights are the inalienable rights of all persons who are by nature free and independent, and the courts of this state are bound by the Constitution to protect those rights.

De Vita was arrested (R. p. 652) on Tuesday, November 13, 1951 at about 1—1:30 in the afternoon and from that time on until November 16 at about 6:00 o'clock in the morning, was constantly questioned by police officers (R. pp. 652-653). His requests for permission to see friends or relatives, for a lawyer, for the right to make a phone call to his friends or family, were denied; (R. pp. 660-682) and Sgt. Joseph A. Kinney offered by the state, (R. p. 552) testified that the complaint against De Vita was made on the night of November 15, 1951 at 11 p. m. and (R. p. 563) De Vita was not allowed to see a member of his family or even a lawyer until he had been questioned from November 13, 1951, when De Vita was arrested, until the early morning of November 16, 1951, when his written statement was taken, and that he was not arraigned until November 16, 1951 at 10 o'clock although there was a magistrate available prior thereto, and another state's witness, Detective Irving W. Schoeneick, (R. p. 619) stated that De Vita was questioned by "all of us, five of us".

In re: State of N. J. v. Schmieder, 5 N. J. 40, the defendant asserted that he was deprived of his rights under Rule 2:3-3 (a), (b), requiring a person arrested to be taken to the nearest available magistrate without unnecessary delay and a complaint to be filed forthwith, a warrant issue, and the magistrate to inform the accused of the complaint against him and of his right to retain counsel and of his

right to have a preliminary examination, the N. J. Supreme Court held,

> "We do not condone the failure of the police and prosecuting authorities to adhere to the provisions of the rules. *By this time the Prosecutor of the Pleas, their assistants, their detectives and the police should be sufficiently cognizant of the rules to observe them.* But, as we have said on several occasions, violations of the provisions of the procedural rules, standing alone, will not vitiate a statement of a defendant voluntarily made, which, without question, this was."

In the Schmieder case, the defendant stated that his complaint against the admission of the confession is that "when he read the statement and before he signed it, he was tired, had nothing to eat and was questioned for seven hours." At the trial "there was no objection to the admission of the confession as a voluntary statement." The court further stated:

> "The failure to follow Rule 2:3-3 does not violate due process under the Fourteenth Amendment of the Federal Constitution".

Failure to follow these rules in the instant case is violative of the rights of an accused, guaranteed to him under the aforegoing provisions of the United States and New Jersey Constitutions and is in conflict with the reasoning given by Mr. Justice Douglas, Mr. Justice Black and Mr. Justice Frankfurter *in re:* United States v. Carignan, above cited, and as said therein by said Justices,

> "Gives sanction to a police practice which makes detention the means of investigation. Therein lies its vice."

The rules having the force and effect of law, the violation thereof by persons in authority, and the enforcement of the federal rule by the courts of the United States is an abridgment of the privileges or immunities of citizens of each state and of the United States, and a denial to any person within its jurisdiction of the equal protection of

the laws within the meaning of the Fourteenth Amendment to the United States Constitution. Obviously, under similar circumstances, "A" accused by federal authorities and "B" accused by state authorities would not be dealt with on an equal basis, and such is not the intendment of the provisions of the Constitution.

In re: State of N. J. v. Pierce, 4 N. J. 252, the failure to take Pierce before the nearest available magistrate without unnecessary delay under Rule 2:3-3, the Supreme Court of New Jersey stated:

> "This rule of procedure was adopted and promulgated by this court designed to protect persons arrested and taken into custody from being held incommunicado for protracted periods of time, thus stimulating and permitting the suggestion that the confession, when given, was extorted through improper police pressure and methods more popularly designated as the 'third degree,' "

and the court continued, saying,

> "Whenever there has been any intentional delay in taking an arrested person before a magistrate, in violation of our rule, careful scrutiny will be given to the conditions under which a statement was taken from him during the period of delay, and such a statement will be admitted in evidence only when it convincingly appears that it was in fact and in truth voluntarily made,"

and the court said in said case,

> "The mere failure to follow the procedural rule, however, does not of itself destroy the voluntariness of the confession if the abuses the rule seeks to prevent did not in fact take place."

The enforcement of the rules would prevent the abuses. But in the Pierce case,

> "There were no long hours of uninterrupted grilling. The record shows but two hours of interrogation, after which the appellant was committed to a cell, left alone to compose himself and relax for a period of approxi-

> mately two and one-half hours. Thereafter, he made his oral statement, which was then reduced to writing in the presence of a stenographer."

That is not the situation in the DeVita case, as is indicated from the summary statement of the matter involved, set forth in the petition or the transcript. The Court in the Pierce case further stated,

> "Our inquiry, therefor, is directed to the circumstances existing during the interrogation of the appellant to determine whether or not duress, or fear was created sufficient to rob his subsequent statement of its voluntary character and thereby render it inadmissible."

The difficulty encountered is indicated by a concurring opinion in the Haley case, (Haley v. Ohio, 332 U. S. 596),

> "* * * We have neither physical or intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for the exclusion of the statement so secured."

The adherence to the rules promulgated pursuant to constitutional mandate would obviate all of the aforegoing inquiries and would not place an accused in a position of jeopardy surrounded by officials in authority without aid, subject to constant pressure. Can it be said that an individual confined for sixty-four hours without rest or food making an incriminatory statement, that the making thereof is voluntary? If it is voluntary, why the delay in the arraignment? Why the presence of five officers to obtain a voluntary confession?

In re: State of N. J. v. Cooper, 10 N. J. 532, the Supreme Court stated:

> "Persons detained and questioned in connection with a serious crime, generally exhibit some nervousness and even fear. An experience so foreign to the normal routine of daily life cannot but evoke a measure of apprehension, or in the appellant's phrase, 'pressure.' "

The rules are a cloak to safeguard the individual against unreasonable detention and questioning; otherwise, why the rules? If not enforced, they are a sword. In the Cooper case, Rule 2:3-3 requiring an accused to be arraigned before the nearest magistrate without unnecessary delay, was not in effect when Cooper was arrested, and the Court held that,

> "Even had it been, the five-day delay in arraignment under the circumstances here proven, did not in itself invalidate the statements."

The circumstances being, that English was questioned for several hours on the day of his arrest, he was allowed frequent respites for rest and meals during this time; he was questioned only two or three times for a few minutes on each occasion with long intervals of rest in between, and on the third day, there was a total of about five to five and one-half hours of interrogation with a rest interval of approximately five hours between the sessions and during the ensuing two days before making the confession. The questioning periods were few, brief and widely separated in time. Cooper underwent even fewer and shorter interrogations. There is nothing in the Cooper record to indicate the accused were subjected to physical discomfort, mistreatment or inconvenience or deprived of clothing, food or rest.

The prosecutor in his summation to the jury, (R. p. 1139) stated,

> "DeVita and Grillo were arrested on the 13th. Rosania on the 14th. They were working around-the-clock as has been testified here, breaking this case wide open, (referring to the police authorities). On the evening of November 15 at 6 o'clock or 7 o'clock the defendants had admitted their guilt orally."

Such statement is dispositive as to the fact of continuous interrogation of DeVita while in solitary confinement and prior to arraignment.

Holding DeVita in durance was without legal sanction and ought to be condemned. Only one remedy exists to deter violations of the rules of the court and that is, a rule which excludes confessions obtained in violations of the rule. Unless the rules of criminal practice 2:3-3, (a), (b), (c) are strictly observed, similarly to federal rule 5 (a), (b) of Criminal Procedure, the practice denies equal justice under the law. Such discrimination is a denial of equal protection of the laws under both constitutions and violative of the basic principle that everyone stands on an equal footing before the bar of justice in any American court and makes that principle meaningless. The liberty of an individual ought not to be dependent upon the whim or caprice of officials. The state is sovereign and neither needs nor should accept any technical advantage over any subject. The constitutions, both federal and state, should prohibit officials from using the private, secret custody of any individual as a device for wringing confessions and from convicting an accused on evidence that he was compelled to give against himself. To hold otherwise is to legalize the procedure which conflicts with the accepted principles of due process. A conviction resting on evidence secured through a flagrant disregard of procedural rules ought not to be allowed to stand. "Without unnecessary delay" is not the equivalent of a sixty-four hour delay.

The State offered in evidence S-69 for identification (R. pp. 624, 651) and there was an objection thereto (R. p. 660), the grounds thereof being that the confession was obtained in violation of the principles of law enunciated in the cases cited, and *in re:* Watts v. Indiana, 338 U. S. 49 Harris v. South Carolina, 338 U. S. 68, in that, the confession was obtained in violation of DeVita's constitutional rights. The confession was allowed in evidence (R. p. 688).

Detective George E. Meagher (R. p. 624) a state's witness, testified that he took the statement from DeVita and that the statement was written in the Detective's own handwriting (R. p. 625), consisting of nine pages, the writing whereof was commenced at 12:40 a. m. on November 16, 1951, and completed with the exception of the last paragraph at 4:20 a. m. on the morning of the 16th (R. p. 629) and that it is a verbatim statement, word for word, DeVita's (R. p. 631).

Charles V. Webb, Jr., state's witness, (R. p. 644) testified that after DeVita had signed the statement, he was fed. The "so-called impartial" state's witness, Charles T. Schaedel (R. p. 649) who was not present on November 13 nor 14 nor 15, but who received a phone call to stand-by the morning of November 16 so that he could be the impartial witness to ask DeVita concerning his treatment, came to police headquarters at 2:00 o'clock, the morning of the 16th, and had no conversation with DeVita until after the signing of the statement (R. p. 629). One inquires why Schaedel received a phone call and why he was standing by, to thereafter act as a witness and to testify, if DeVita being in custody on November 13, 14, 15 and 16, Schaedel could have spoken to him during all this time and could have arranged to secure his required needs and if a reasonable inference does not arise, that he was told to stand by until DeVita was harassed into a confession. An examination of S-69 in evidence is indicative that it is the product of the interrogators and not of the young boy, DeVita. In a reading thereof one notes that he was born on November 5, 1931, that his mother is dead, he graduated from First Avenue Public School in June 1947, he left school to go to work, the confession is properly punctuated, paragraphed, written in sequence, giv-

ing the day, month, year, time, places, names in great detail. Notice the punctuation of the word "job". Notice detail as to streets, cities, number of streets and persons referred to. The confession is written on sheets of paper nineteen inches in length, eight inches in width. The graphic story is complete in every detail. It took four hours to write. After it was written and signed, food was given to DeVita. These and other unchallenged facts are irreconcilable with mental freedom and voluntary statement.

In re State of New Jersey v. Bunk, 4 N. J. 461, (Certiorari denied, 340 U. S. 839, 71 S. Ct. 25,) the confessions were made after arrest and without warrant and prior to arraignment. The Supreme Court of New Jersey concluded that,

> "*There was no protracted or unlimited interrogation.*"

In the instant case, the State does not challenge that DeVita was held incommunicado for sixty-four hours; that he was not allowed to communicate with anyone; that he was questioned around the clock by teams of officers, members of the bandit squad, members of the homicide squad; that he had no sleep; that there was no bed in the cell, and that he received food the morning of November 16, 1951 after he signed the written confession.

In re: State of New Jersey v. Bunk, the law laid down *in re:* State v. Cooper, was reiterated,

> "A confession induced by physical or moral compulsion, whatever its nature, has no evidential efficacy";

and again, the court stated that, although the arrest and arrangement of defendants in the Bunk case occurred befor the effective date of Rules 2:3-3, but giving full force to said rules, a confession made is not *ipso facto* inadmissible solely by reason of the violation of the procedural

rule. Neither does the failure to follow the rule violate due process under the Fourteenth Amendment of the federal constitution, even though it might be a violation of due process under the Fifth Amendment and the federal implementing statutes and rules applicable to criminal proceedings in the United State Courts.

In the instant case, it is, contended that the failure to obey the rule violates the due process provisions of the state's own constitution.

In re: People v. Mummiani, 258 N. Y. 394,

> Appellant was arrested on the evening of February 9th, 1931. He was taken to the police station. He was detained there for thirty-six hours, in defiance of a statute, before he was arraigned in court. By section 165 of the Code of Criminal Procedure "the defendant must in all cases be taken before the magistrate without unnecessary delay." This was a plain wrong for which some one should be punished. Disregard of the duty of arraignment does not avail, however, without more to invalidate an intermediate confession. (People v. Trybus, 219 N. Y. 18; People v. Doran, 246 N. Y. 409). It is only a circumstance to be weighed with others in determining whether a confession has any testimonial value.
>
> The defendant, during his unlawful detention, was questioned by police officers. He denied guilt. Five police officers were present at his questioning. They testify that he was not beaten but that, at about eleven o'clock in the morning after his arrest, he stated that he would tell the truth if they would give him some food. They gave him the coffee for which he asked. Then, in the presence of a stenographer, he made a detailed confession that he had committed the crime. He repeated that confession with some unimportant variations before an Assistant District Attorney the same afternoon.
>
> Where a defendant has given a detailed confession, he knows that he can escape its effect only by testimony,

true or false, that it was extorted from him through fear induced by threats. Only a false sentimentality would lead to giving greater weight to his highly interested assertion than to the denial of the police officers who have no interest except to see that crime is prevented or the wrongdoer punished. On the other hand, no false sentimentality towards the police, however brave and zealous they may be, should lead us to condone disregard of the law by its sworn protectors or to give a testimonial value to a confession which under the law has no such worth.

Here though the assertion of the defendant that he was beaten is met by denial of the police officers who are accused of the brutality and threats, they do not deny that they held the defendant unlawfully without arraignment for thirty-six hours until they had obtained his confession. They admit that while they unlawfully held the defendant in the police station, one of them gave the defendant a clean shirt in place of one which the defendant claims was made bloody by alleged beating and a blow on the nose. They admit that if this gift was made in a spirit of charity, the same spirit did not induce them to furnish the defendant with any food until he promised to give a statement, "If you get me some food." They content themselves with a bare denial of violence, giving no details or explanation of why they held him unlawfully or what occurred before he gave the confession or what induced a change by the defendant from stout assertion of innocence to confessions of guilt, nor do they explain why the presence of five police officers was required to induce a "voluntary" confession.

The growing number of instances in which officers of the police force stand accused at our bar of threats and brutality in the extortion of confessions is a cause of deep concern to all the judges of the court. We feel it a solemn duty, irrespective of the outcome of this cause, to remind the officers of the law that the suspicion now attaching to them has been fostered by their own conduct, at times by abuse of power, not amounting

in itself to violence or coercion, but furnishing the soil out of which violence and coercion spring, at times by sheer indifference, a cynical refusal to inquire where relentless pressure of the probe would be likely to reveal too much.

The *police are guilty of oppression and neglect of duty* when they willfully detain a prisoner without arraigning him before a magistrate within a reasonable time. (Code Crim. Pro. Sec. 165.) The *conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter.* Until arraignment before a magistrate, he is held incommunicado, without the protection that comes from the advice of counsel or the encouragement derived from the presence of family or friends. After arraignment, he has these and other helps to fortitude. In a vast majority of the cases that have come before this court with a defense that a confession was illegally extorted, perhaps, indeed, in all, the wrong, if there was any, was done before the prisoner was brought to court, and would probably have been prevented if he had been brought there without delay. (Cf. Lawlessness in Law Enforcement, vol. IV of the Reports of the National Commission on Law Observance and Enforcement, June, 1931.)

The willful violation by the police of the statute which calls for prompt arraignment is a crime. (Penal Law, Sec. 1841.) An officer who holds a prisoner in custody instead of taking him to the nearest magistrate without unreasonable delay should be disciplined by his superiors, and prosecuted by the District Attorney like any other malefactor. A District Attorney who willfully neglects to initiate such a prosecution after knowledge of the offense may be guilty of a crime himself.

We are told that here the defendant's story is improbable because he did not complain to prison physician, District Attorney or magistrate that he had been beaten. That is a circumstance to be considered by the jury, but it is certainly not conclusive. The prison physician testified that though no such complaint was

made, his records show that the defendant did ask for the zinc salve which is commonly used "for any abrasion or contusion." Then, too, it is not without significance that the prison physician also testified that the defendant is of an emotional type that gives in to pain and suffering and might talk or do things in order to avoid physical pain. Moreover, according to the defendant's testimony, even when he was on the way to the District Attorney's office the police officers continued their threats.

We refrain from pointing out possible answer to other contentions that the defendant's story is improbable. To do so might lead to the implication that we believe that in this case the jury could not reasonably refuse credence to the defendant's story; though, as we have said, upon this record the jury might reasonably credit the denial of the police that they made use of the opportunity afforded by the defendant's unlawful detention, to compel an incriminating statement by threats and violence.

When the judgment is of death, this court has the power and the duty to order a new trial not only "if it be satisfied that the verdict was against the weight of evidence or against law," but also if it be satisfied "that justice requires a new trial." (Code Crim. Pro., Sec. 528.) Doubt whether this defendant has been properly convicted dictates that, in his interest and in the interest of society alike, there shall be a new trial where there can be a more adequate search for the truth." The judgment was reversed.

In re: White v. State of Texas, 310 U. S. 530, 60 S. Ct. 1032, (1940), petitioner was convicted of rape and sentenced to death in the District Court of Montgomery County, Texas. U. S. Supreme Court granted certiorari and reversed the judgment of the state court. The matter came on to be heard on the state's petition for rehearing. The facts are these: On the day following the crime, petitioner, who is an illiterate farm hand, was taken into custody and

was kept in jail for six or seven days and on successive nights was whipped. During the period of his arrest up to and including the signing of his alleged confession, petitioner had no lawyer, no charges were filed against him, and he was out of touch with friends or relatives. While in jail the Sheriff kept watching the petitioner and talking to him. Petitioner was interrogated from 11 p. m. to 3:30 a. m. The alleged confession was reduced to writing at 2 a. m. Two citizens of Beaumont signed it as witnesses. The U. S. Supreme Court held,

> "Due process of law preserved for all by our Constitution commands that no such practice as that disclosed by this record shall send any accused to his death."

It denied the state's petition for rehearing.

Re: State of New Jersey v. Pierce, 4 N. J. 252, (1950), the appeal was from a judgment entered on a verdict of murder in the first degree, life imprisonment having been imposed in accordance with the jury's determination. An altercation took place on March 16; appellant was apprehended about 1:30 p. m. the following day and taken to local police headquarters for questioning which began between 4:00 and 4:30 in the afternoon and continued until about 6:30. He was then locked in a cell at police headquarters until about 9 o'clock in the evening and finally at 11:30 p. m. a statement in question and answer form was taken stenographically and signed by appellant at 1:30 the following afternoon. Later that afternoon, he was taken before a police magistrate and arraigned. The objection to the confession was grounded, in that, appellant was not advised that his statement would be used against him and his being questioned for several hours made him fearful and nervous, and further that he was not arraigned without unnecessary delay in accordance to Rule 2:3-3, the court stated:

Many federal cases are cited disclosing various sets of factual developments which taken in their entirety were found to have created a state of coercion or duress sufficient to invalidate the resulting confessions. In White v. Texas, 310 U. S. 530, 84 L. Ed. 1342 (1940), a suspect was taken into the woods on several successive nights, tied to a tree and whipped. In Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716 (1940), there were five days of long examinations culminating in an all-night session that obviously produced the confession. In Ashcraft v. Tennessee, 322 U. S. 143, 88 L. Ed. 1192 (1944), thirty-six hours of continuous examination by relays of officers brought forth the confession complained of. In Haley v. Ohio, 332, U. S. 596, 92 L. Ed. 224 (1948), a fifteen-year-old illiterate suspect was grilled by relays of officers from midnight to five a. m., when he capitulated and made the desired statement. In Watts v. Indiana, 93 L. Ed. 1434 (1949), six days of long periods of interrogation by relays of officers was undisputed. In Harris v. South Carolina, 93 L. Ed. 1440 (1949), there were three days of vigorous interrogation by relays of officers in stifling heat, while in Turner v. Pennsylvania, 93 L. Ed. 1443 (1949), the defendant was held incommunicado for four days with long periods of constant interrogation. These prolonged periods of interrogation, together with the other conditions and circumstances recited in each of the cases, were determined by the court to be improper and oppressive, making the resulting confessions inadmissible in evidence and violating the rule of "fundamental fairness."

In State v. Cooper, 2 N. J. 540 (1949), we held a confession freely and voluntarily given, uninduced by either hope or fear or other considerations, leading to the substitution of something else than the truth, is testimonially trustworthy and evidential where probative value alone is the measure of its worth, but that under the Fourteenth Amendment the inquiry must also include whether or not there is "that fundamental fairness essential to the very concept of justice."

After referring to the United States Supreme Court cases above recited and the determination the court there made on the respective facts involved as to when and under what circumstances an abuse of power to arrest offends the procedural standards of due process, we held:

> "These are the criteria which determine the evidential competency of the confessions received in evidence here."

In Bute v. Illinois, 333 U. S. 640, 92 L. Ed. 986 (1948), the court referring to the applicability of the due process clause in the Fourteenth Amendment to cases similar to the one presently being considered, said:

"The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the States and do not depend upon or vary with local legislation."

Our inquiry, therefore, is directed to the circumstances existing during the interrogation of the appellant to determine whether or not duress or fear was created sufficient to rob his subsequent statement of its voluntary character and thereby render it inadmissible. The difficulty encountered is indicated by a concurring opinion in the Haley case, *supra:*

> "* * * we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for the exclusion of a statement so secured."

The circumstances here are hardly comparable to those under consideration in the cited United States Supreme Court cases. *There were no long hours of uninterrupted grilling. The record shows but two hours of interrogation,* after which the appellant was committed to

a cell, left alone to compose himself and relax for a period of approximately two-and-a-half hours. Thereafter, he made his oral statement which was then reduced to writing in the presence of a stenographer.

Rule 2:3-3 requires an accused to be arraigned before the nearest magistrate without unnecessary delay. This rule of procedure was adopted and promulgated by this court, designed to protect persons arrested and taken into custody from being held incommunicado for protracted periods of time, thus stimulating and permitting the suggestion that the confession, when given, was extorted through improper police pressure and methods more popularly designed as the "third degree."

Commenting on a similar provision in federal statutes, the United States Supreme Court in McNabb v. U. S., 318 U. S. 332, 87 L. Ed. 819 (1943), said:

> "* * * this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime."

Whenever there has been any undue delay in taking an arrested person before a magistrate, in violation of our rule, careful scrutiny will be given to the conditions under which a statement was taken from him during the period of delay and when such a statement will be admitted in evidence only when it convincingly appears that it was in fact and in truth voluntarily made.

The general rule is set forth in 20 American Jurisprudence, Sec. 499, p. 432:

> "The mere fact that there was an illegal delay in the arraignment of the prisoner will not render a confession involuntary and inadmissible, even though the delay is for the purpose of obtaining a confession. However, the fact of an illegal delay for no apparent reason except that the police need a confession in order to have competent proof of the crime is a matter to be considered in determining whether the confession was given voluntarily."

In People v. Alex, 265 N. Y. 192, 192 N. E. 289 (1934), a defendant was held without arraignment for thirty-six hours, during which period he made a confession. On appeal, he contended his confession had been improperly received in evidence because of the provision of the New York Code of Criminal Procedure that "the defendant must in all cases be taken before the magistrate without unnecessary delay." The violation of the statute, it was held, did not render the confession inadmissible but was a factor to be considered by the jury in determining its voluntariness. A similar holding is found in People v. Elmore, 277 N. Y. 397, 14 N. E. 2d 451 (1938).

Rule 5 of Federal Rules of Criminal Procedure provides an officer making an arrest with or without a warrant "shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States."

The decisions of the federal courts, as nearly as we can construe them, have not been uniform in applying the rule. Thus, in Wheeler v. U. S., 82 U. S. App. D. C. 363, 165 F. 2d 225 (1947), despite a finding that the arresting officers had acted wrongfully in holding the defendant from three o'clock Sunday morning until Tuesday before taking him before the nearest available commissioner, a confession taken on Monday night was held admissible in the absence of a showing it was induced by the delay. Certiorari was denied by the United States Supreme Court, 333 U. S. 829 (1948).

In a recent case, Garner v. U. S., 174 F. 2d 499 (1949), it was stated that any confession made during a period of unnecessary delay in taking a prisoner before a committing magistrate is inadmissible even though the confession was not induced by the illegal detention and was voluntarily given. And in Upshaw v. U. S., 334 U. S. 410, 93 L. Ed. 129 (1948), confessions made during a thirty-hour period of detention without taking the prisoner before a commissioner were held inadmissible, it appearing the delay was for the purpose of furnishing an opportunity for further interrogation.

The construction and application, in the federal courts, of a federal rule of procedure is not, however, the criterion by which state courts are to be guided in construing the due process of law clause of the Fourteenth Amendment. So, in Watts v. Indiana, Harris v. South Carolina and Turner v. Pennsylvania, *supra*, the court found in each case a violation of a state law requiring prompt arraignment of an accused, but this was only one of many facts taken into consideration and recited in detail in each opinion which led to the conclusion that the confessions involved were involuntary.

Here the facts and circumstances surrounding the taking of the statement lead to the opposite conclusion. A confession is not rendered inadmissible solely by reason of a delay in taking the arrested person before a magistrate but that circumstance becomes an important factor to be given serious consideration in determining whether or not the confession was voluntarily made. *The mere failure to follow the procedural rule, however, does not of itself destroy the voluntariness of the confession if the abuses the rule seeks to prevent did not in fact take place.* The primary test of a statement is its voluntary character.

Analysis of the testimony, including Pierce's, concerning the circumstances under which the questioning was conducted indicates no improper or abusive treatment. *The period of questioning was hardly longer and the method employed no harsher than a witness would ordinarily undergo on cross-examination with all the protection the court and his own counsel could afford him. We see no error in the admission of the statement.*

In re: Wolf v. People of Colorado, 338 U. S. 25, 69 S. Ct. 1359 (1949), in which the question for consideration was: Does a conviction by a state court for a state offense deny the "due process of law" solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourteenth

Amendment. Mr. Justice Frankfurter speaking for the court referring to due process, stated:

> Unlike the specific requirements and restrictions placed by the Bill of Rights, Amendments I to VIII, upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. * * * Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment, Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223. The issue is closed.
>
> For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in Palko v. Connecticut, *supra*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to speak only of the dead. In rejecting the suggestion that the Due Process Clause incorporated the original Bill of Rights, Mr. Justice Cardozo reaffirmed on behalf of that Court a different but deeper and more pervasive conception of the Due Process Clause. * * *
>
> Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to ad-

vance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion." Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. Ed. 616. This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since Davidson v. New Orleans was decided.

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implict in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English speaking peoples.

In re: Ward v. State of Texas, 316 U. S. 547, 62 S. Ct. 1139, (1942), petitioner was granted a writ of certiorari in *forma pauperis*. He contended that his confession was procured after he had been arrested without a warrant, placed in a jail more than 100 miles from his home, ques-

tioned continuously and beaten by the officer to whom the confession was made. Petitioner's contention that he was beaten was squarely denied. All the officers involved asserted that he had not been mistreated, with the exception of the slap by Redfearn. Mr. Justice Byrnes speaking for the court, stated,

> "Each State has the right to prescribe the tests governing the admissibility of a confession. In various States there may be various tests. But when, as in this case, the question is properly raised as to whether a defendant has been denied the due process of law guaranteed by the Federal Constitution, we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process.
>
> Conceding that the question of physical mistreatment was conclusively resolved by the jury's verdict, we return to the admitted facts. There can be no doubt that from first to last the officers acted without authority of law. The sheriff of Morris county had no power to arrest petitioner in Titus county. Without the boundaries of Morris county he had no more authority than any private citizen. Ledbetter v. State, 23 Tex. App. 247, 5 S. W. 226; Hooper v. Diesher, Tex. Civ. App., 113 S. W. 2d 966, 967. Nor did Constable Redfearn of Titus county have the right to take petitioner into custody. Under Article 215 of the Texas Code of Criminal Procedure the sheriff must procure a warrant before making an arrest unless he has been advised by a credible person that a felony has been committed and that the offender is about to escape. See Rutherford v. State, 104 Tex. Cr. R. 127, 283 S. W. 512. And Article 217 provides that the person making the arrest must immediately take the person arrested before the magistrate if the arrest is made without a warrant. Neither the sheriff of Morris county nor Constable Redfearn made any effort to secure a warrant. Instead of taking petitioner to the nearest magistrate they took him away from the nearest magistrate.

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado, without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case.

The judgment was reversed.

In re: Stroble v. State of California, 343 U. S. 181, 72 S. Ct. 599, petitioner was convicted of first degree murder and sentenced to death. He claimed that his conviction was based in part on a coerced confession; that a fair trial was impossible because of inflammatory newspaper reports inspired by the District Attorney; that he was deprived of counsel in the course of his sanity hearing; that there was an unwarranted delay in his arraignment; that the prosecuting officers unjustifiably refused to permit an attorney to consult petitioner shortly after his arrest. Petitioner was arrested around noon on Thursday, November 17, 1949. He was arraigned at 10:00 o'clock the following morning and a city public defender was appointed to represent him. A preliminary hearing was held on Monday, November 21. On November 25, petitioner was arraigned in the Superior Court and a county public defender was appointed as his counsel. While enroute to the District Attorney's office, the petitioner had a conversation with a police officer and the officer's entire testimony regarding this conversation is uncontradicted insofar as it contains a confession by petitioner and no objection was made at the trial that the confession was involuntary. Petitioner did object at the trial to the introduction of a confession which he made after his arrival at the District

Attorney's office. This confession was recorded on a recording machine. It took approximately 2 hours. Petitioner thereafter made 5 confessions which were put in evidence. The trial court concluded that the confession did not deprive petitioner of due process. Mr. Justice Clark speaking for the court stated,

> We take a somewhat different view. If the confession which petitioner made in the District Attorney's office was in fact involuntary, the conviction cannot stand, even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict. Malinski v. New York, 1945, 324 U. S. 401, 402, 404, 65 S. Ct. 781, 782, 783, 89 L. Ed. 1029; Lyons v. Oklahoma, 1944, 322 U. S. 596, 597 note 1, 64 S. Ct. 1208, 1210, 88 L. Ed. 1481. That confession was a prominent feature of the trial. First a stenographic transcript of the confession was read, and then a wire recording of it was played to the jury. Under these circumstances we cannot say that the jury's verdict could not have been based, at least in part, on the confession made in the District Attorney's office. Since we take this view, we cannot merely "assume," as did the state supreme court, that that confession was involuntary, but must go on to determine the question of voluntariness.
>
> Petitioner does not so much as suggest that the action of any officer during the taking of the confession was accompanied by force or threats. His sole contention is that the incidents in the park foreman's office, coupled with the presence of nineteen officers in the District Attorney's office, render the confession which he made in the latter office involuntary.
>
> This court has frequently stated that, when faced with the question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession, it must make an independent determination on the undisputed facts. Malinski v. New York, *supra*, 324 U. S. at page 404, 65 S. Ct. 783, and cases cited; 324 U. S. at page 438, 65 S. Ct. 798 (dissenting opinion). We adhere to that rule. In the present case, however, we need not con-

fine ourselves to the undisputed facts; for, even if we give petitioner the benefit of every doubt as to the alleged coercion, we do not think it can fairly be said that this confession in the District Attorney's office was coercion's product. Whatever occurred in the park foreman's office occurred at least an hour before he began his confession in the District Attorney's office, and was not accompanied by any demand that petitioner implicate himself. Likewise, his statement to the officer while on the way to the District Attorney's office was admittedly voluntary. In the District Attorney's office, petitioner answered questions readily; there was none of the "pressure of unrelenting interrogation" which this Court condemned in Watts v. Indiana, 1949, 338 U. S. 49, 54, 69 S. Ct. 1347, 1350, 93 L. Ed. 1801."

The judgment of the Supreme Court of California was affirmed. Mr. Justice Douglas and Mr. Justice Black dissented, stating:

My views on the illegality of confessions obtained between the time of arrest and arraignment are contained in Watts v. Indiana, 338 U. S. 49, 56-57, 69 S. Ct. 1347, 1351, 93 L. Ed. 1801; Turner v. Com. of Pennsylvania, 338 U. S. 62, 66-67, 69 S. Ct. 1352, 1353, 1354, 93 L. Ed. 1810; Harris v. South Carolina, 338 U. S. 68, 71-73, 69 S. Ct. 1354, 1356, 1357, 93 L. Ed. 1815. The practice of obtaining confessions prior to arraignment breeds the third degree and the inquisition. As long as it remains lawful for the police to hold persons incommunicado, coerced confessions will infect criminal trials in violation of the commands of due process of law.

The facts of this case illustrate the evils of this police practice. While the defendant was being held by the police prior to his arraignment, a lawyer tried to see him. The police refused the lawyer's repeated requests. It was only after a confession was obtained that the lawyer was allowed to talk with the prisoner. This was lawless conduct, condemned by the Supreme Court of California. It was not only lawless conduct; it was conduct that produced a confession.

> This confession as well as subsequently obtained confessions were used at the trial. The fact that the later confessions may have been lawfully obtained or used is immaterial. For once an illegal confession infects the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be. Malinski v. New York, 324 U. S. 401, 65 S. Ct. 781, 89 L. Ed. 1029.

In re: Carter v. State of Illinois, 329 U. S. 173, 67 S. Ct. 216, (1946), in 1928, petitioner pleaded guilty to an indictment for murder and was sentenced to imprisonment for 99 years. In 1945, he petitioned for his release on a writ of error to the Supreme Court of Illinois claiming that he was deprived of the right to assistance of counsel under the Fourteenth Amendment. The Supreme Court of Illinois affirmed the judgment of conviction. Mr. Justice Frankfurter speaking for the court said,

> The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A state must give one whom it deprives of his freedom the opportunity to open an inquiry in to the intrinsic fairness of a criminal process even though it appears proper on the surface. Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, *dehors the record.*
>
> A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity or of his own ignorance or bewilderment.

In re: Gallegos v. State of Nebraska, 342 U. S. 55, 72 S. Ct. 141, (1951) petitioner was convicted of manslaughter in the District Court of Nebraska, and sentenced to ten

years imprisonment. The conviction was sustained by the Supreme Court of Nebraska. Certiorari was granted to determine whether the due process requirements of the Fourteenth Amendment were violated by the admission of petitioner's statements admitting the homicide.

Mr. Justice Reed announced the judgment of the court and was joined in by the Chief Justice, Mr. Justice Burton and Mr. Justice Clark.

On September 19, 1949 petitioner was arraigned and questioned. On September 20, 1949 petitioner was again questioned. Thereafter he was left alone for 48 hours. On September 22, 1949 he was questioned and he was left alone for 24 hours. On September 26, 1949 he gave the statement. His arrest occurred in Texas and he was detained in Texas until September 27, 1949. During the entire time, no charge was filed against him in any state or federal court nor was he brought before a magistrate. His cell had no bed, was poorly lighted and the food was sparse, not more than a meal a day. He was not treated with violence. His questioning did not last more than an hour or two on any day. No threats or promises were made. On September 27, 1949 he was taken to Nebraska. There was no claim of mistreatment by Nebraska authorities. By Nebraska statute, a police officer is commanded to take an accused before a magistrate. This was not done until October 13, 1949 when petitioner had a preliminary hearing. He pleaded guilty. The two confessions and the plea were introduced at the trial. Petitioner had counsel appointed for the first time at the trial.

The question raised by petitioner is: "Are confessions and a plea obtained from a prisoner during a period of 25 days, illegal detention by federal and state officers before

being brought before a magistrate and before counsel is appointed to assist the prisoner, admissible in evidence."

The court stated:

As this Court has been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, the proper performance of that duty requires us to examine, in cases before us, such undisputed facts as form the basis of a state court's denial of that right * * * A contrary rule would deny to the Federal Government ultimate authority to redress a violation of constitutional rights. As state courts also are charged with applying constitutional standards of due process, in recognition of their superior opportunity to appraise conflicting testimony, we give deference to their conclusions on disputed and essential issues of what actually happened. Its duty compels this Court, however, to decide for itself, on the facts that are undisputed, the constitutional validity of a judgment that denies claimed constitutional rights * * * The use of any confession obtained in violation of due process requires the reversal of a conviction even though unchallenged evidence, adequate to convict remains * * * Prolonged detention without a charge of crime or without preliminary appearance before a magistrate, the lack of counsel before, during, or after arraignment, and confession to the police in private, are, however, elements that should be considered in determining whether a confession, permitted to be introduced and relief upon at a trial, has been obtained under *such circumstances that its use violates due process.*

Judgment was affirmed.

Mr. Justice Black and Mr. Justice Douglas dissent, stating:

Americans justly complain when their fellow citizens in certain European countries are pounced upon at will by state police, held in jail incommunicado, and later convicted of crime on confessions obtained during such incarceration. Yet in part upon just such a

confession, this Court today affirms Nebraska's conviction of a citizen of Mexico who can neither read nor understand English.

As is usual in this type of case the deputies say that the confession was wholly "voluntary"; petitioner says that it was due to fear engendered by his incarceration and the actions of the deputies. Even if the officers' story should happen to be correct, I believe the Constitution forbids the use of confessions obtained by the kind of secret inquisition these deputies conducted.

There are countries where arbitrary arrests like this, followed by secret imprisonment and systematic questioning until confessions are obtained, are still recognized and permissible legal procedures. See "The Trap Closes" by Robert A. Vogeler with Leigh White, The Saturday Evening Post, November 3, 1951, p. 36 *et seq.* My own belief is that only by departure from the Constitution as properly interpreted can America tolerate such practices. See Ashcraft v. State of Tennessee, 322 U. S. 143, 154-155, 64 S. Ct. 921, 926-927, 88 L. Ed. 1192; Chambers v. State of Florida, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716; Bram v. United States, 168 U. S. 532, 556, 562-563, 18 S. Ct. 183, 192, 194, 42 L. Ed. 568. I would reverse this judgment.

In re: Turner v. Pennsylvania, 338 U. S. 62, 69 S. Ct. 1352, (1949), appellant was convicted of murder in the first degree committed during perpetration of a robbery. The Supreme Court of Pennsylvania affirmed the conviction and this Court reversed. Appellant was arrested the morning of June 3, 1946. The officers making the arrest had no warrant. Appellant was questioned for three hours on that afternoon and again that night for three hours. From time to time other officers joined in the interrogation. The next morning June 4 the petitioner was booked on the police records as being held for questioning. Later that day he was questioned for about four hours more. On June 5 he was interrogated for another four hours and on the 6th for day and night sessions totaling six hours.

The questioning was conducted some times by one officer and at other times by several working together. On June 7, appellant confessed. During all this period of time the petitioner was not permitted to see friends or relatives; he was not informed of his right to remain silent until after he had been under the pressure of a long process of interrogation and had actually yielded to it. The delay of five days was in violation of a Pennsylvania statute which requires that arrested persons be given a prompt preliminary hearing. The conviction was reversed. Mr. Justice Black, Mr. Justice Douglas concurred, stating,

> "The case is but another vivid illustration of the use of illegal detentions to exact confessions."

In re: Chambers v. State of Florida, 309 U. S. 227, 60 S. Ct. 472, the question presented by the petition for certiorari granted *in forma pauperis* is, whether proceedings in which confessions were utilized and which culminated in sentences of death failed to afford the safeguard of due process.

The State of Florida challenged the court's jurisdiction to look behind the judgments below claiming that the petitioner was precluded by the final determination by a jury of the issues of fact upon which petitioners based their claim.

About 9:00 o'clock on May 13, 1933 a white man was robbed and murdered and between 9:30 and 10:00 o'clock after the murder petitioner, Charlie Davis was arrested and within 24 hours petitioners, Williamson, Chambers and Woodward were arrested without warrants and confined in the jail. From the afternoon of Saturday, May 20 until sunrise on the 21st petitioners underwent persistent and repeated questioning. During the week following their arrest and until their confessions petitioners

were lead one at a time from their cells to the questioning room, quizzed and returned to their cells to await another turn. The petitioners at no time were permitted to see or confer with counsel or a single friend or relative. The testimony is in conflict as to whether the petitioners were threatened or physically mistreated until they agreed to confess. During the period of time of petitioners' confinements they only had short intervals for food and rest. The confessions were obtained and reduced to writing. No formal charges had been brought before the confessions. Two days thereafter petitioners were indicted, arraigned, and petitioners Williamson and Woodward pleaded guilty and Chambers and Davis pleaded not guilty. Upon assignment of counsel, Davis withdrew his plea and pleaded guilty. When Chambers was tried his conviction rested upon his confession and the testimony of the other three confessors.

Mr. Justice Black, speaking for the court, stated:

"* * * Since petitioners have seasonably asserted the right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained by review of the facts upon which that issue necessarily turns."

"The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially util-

ized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by 'the law of the land' forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.

"The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from

secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless. * * *

"Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, * * * but shows without conflict, the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by State officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and stoutest resistance. * * *

"We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, nor more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

The judgment was reversed.

In re: Malinski v. State of N. Y., 324 U. S. 401, 65 S. Ct. 781, (1945), Malinski and Rudish were convicted of murder,

conviction affirmed by Court of Appeals of New York. Malinski was arrested the morning of Friday, October 23, 1942. He was taken to a room in a hotel, stripped and kept naked until about 11 a. m. when he was allowed to put on part of his clothing. He was beaten by the police, but the police denied the beating. There were no visible signs, bruises or scars and Malinski made no complaint to the judge on arraignment. Thereafter, Malinski confessed, and he was allowed to dress. He was kept at the hotel for the next three days. He was questioned on the 24th, 25th, 26th, 27th. The confession was introduced at the trial. The trial court held a preliminary hearing on the voluntary character of the confession. The trial court charged the jury that the confession should not be considered by them unless they found beyond a reasonable doubt that it was voluntary. It was held that,

> *The judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict.*
>
> If the evidence alone is not sufficient to show that the confession was coerced the comments of the prosecutor placed it beyond doubt. For in his summation to the jury he made certain statements which the Court of Appeals said were indefensible.
>
> And so, when a conviction in a state court is properly here for review, under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record can be found to disclose an infraction of one of the specific provisions of the first eight amendments. To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of psychological assumptions and reasoning, that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt deter-

mined. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review. But there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty.

And so, with every respect for the contrary views of the majority of the judges below and of some of my brethren here, I cannot escape agreement with the Chief Judge of the New York Court of Appeals and two of his associates that there was not in this case a fair trial of the issues vital to the determination of guilt or innocence. Considering the circumstances of Malinski's detention, the long and continuous questioning, the willful and wrongful delay in his arraignment and the opportunity that that gives for securing, by extortion, confessions such as were here introduced in evidence, the flagrant justification by the prosecutor of this illegality as a necessary police procedure, inevitably calculated to excite the jury—all these in combination are so below the standards by which the criminal law, especially in a capital case, should be enforced as to fall short of due process of law.

In reviewing a state criminal conviction we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes. On the other hand, in the discharge of that duty we must give no ear to the loose talk about society being "at war with the criminal" if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people. Despite the fact that English criminal justice has serious inadequacies and lags behind some of our penological advances, it is undeniable that on the whole it is much more effective than ours. Yet there can be no doubt, as English parliamentary proceedings and the reports of the English Court of Criminal Appeals amply prove, that practices such as this record reveals are not there tolerated. See, for instance, Inquiry in Regard to the Interrogation by the Police of Miss Savidge (1928), Cmd.3147; 217 H.C.Deb. (5th ser. 1928), May 17, 1928, 1303 *et seq.* Whatever differences there may be between the situations in England and in this country in the task of law enforcement, it is intolerable to suggest that we cannot have effective law enforcement without conduct such as this record spreads before us. The notion that we must resort to such methods in order to check crime or to convict criminals has been rejected by those who have had most to do with the criminal law. After consideration of the problem, a committee of eminent lawyers reported this conclusion:

> "The remedy for the ills which afflict the administration of criminal justice, whatever that remedy may be, will not be found in measures which violate law. Such expedients, so far from restoring health and vigor to the system, only aggravate and protract the disorder. Under our form of government the machinery of criminal justice depends for its force and efficiency upon the enlightened moral sense of the individuals to whom the public by their constitution and laws have temporarily entrusted its operation.

> And it is as unwise as it is unwarranted for these servants of the public to violate the constitution and laws in the vain hope of accomplishing, useful or beneficial results."
>
> Yearbook (1928) Association of the Bar of the City of New York, 235, 255.

These were the views of three former United States Attorneys for the Southern District of New York and three former District Attorneys for New York County whose experience and effectiveness as prosecutors would hardly countenance doctrinaire or sentimental views.

Mr. Justice Rutledge, dissenting in part.

> However great the proof against him otherwise may be, under our system no man should be punished pursuant to a judgment induced wholly or in part by a coerced confession.

In re: Harris v. State of South Carolina, 338 U. S. 68, 69 S. Ct. 1354, petitioner was taken into custody on Friday, July 12, 1946. He was briefly interrogated on Monday afternoon; on Monday night he was questioned by five officers working in relays. On Tuesday the questioning continued. On Wednesday the questioning continued. At 6:30 on Wednesday evening the petitioner confessed. Petitioner was not informed of his rights under South Carolina law to secure a lawyer, to request a preliminary hearing or to remain silent. No preliminary hearing was given. During the whole period of interrogation, he was denied the benefit of consultation with family and friends and was surrounded by as many as a dozen persons in authority. Upon appeal the highest court of the state concluded the confession was valid. This court held,

> The systematic persistence of interrogation, the length of the periods of questioning, the failure to advise the petitioner of his rights, the absence of friends or disinterested persons, and the character of the de-

fendant constituted a complex of circumstances which invokes the same considerations which compelled our decision in Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, and Turner v. Commonwealth of Pennsylvania, 338 U. S. 62, 69 S. Ct. 1352. The Judgment is accordingly reversed.

Mr. Justice Douglas concurring further stated,

This is another illustration of the use by the police of the custody of an accused to wring a confession from him. The confession so obtained from literate and illiterate alike should stand condemned. See Haley v. State of Ohio, 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224.

In re: Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, (1949), the Supreme Court of Indiana rejected petitioner's claim that convictions elicited from him were procured under circumstances rendering their admission as evidence against him a denial of due process of law. On November 12, 1947, a Wednesday, petitioner was arrested and questioned by officers in relays from about 11:30 that night until about 2:30 and 3:00 o'clock the following morning; from about 5:30 in the afternoon until about 3:30 in the following morning by relays of 6 to 8 officers and the questioning continued on Thursday, Friday, Saturday, Monday. Sunday was a day of rest free from interrogation. About 3:00 o'clock on Tuesday the petitioner made the incriminatory statement. Apart from the questioning the police drove the petitioner around town with a view to eliciting information and other disclosures. Mr. Justice Frankfurter for the court stated:

On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple. But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn

from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. Hooven & Allison Co. v. Evatt, 324 U. S. 652, 659, 65 S. Ct. 870, 874, 89 L. Ed. 1252, and cases cited. Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. See Norris v. State of Alabama, 294 U. S. 587, 589, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074; Marsh v. State of Alabama, 326 U. S. 501, 510, 66 S. Ct. 276, 280, 281, 90 L. Ed. 265.

In the application of so embracing a constitutional concept as "due process," it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men. * * *

Although the law of Indiana required that petitioner be given a prompt preliminary hearing before a magistrate, with all the protection a hearing was intended to give him, the petitioner was not only given no hearing

during the entire period of interrogation but was without friendly or professional aid and without advice as to his constitutional rights. Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant, not as aggravating elements of petitioner's treatment, but as part of the total situation out of which his confessions came and which stamped their character.

A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.

This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, The Development of Present-Day Criminal Procedures in Europe and America, 48 Harv. L. Rev. 433, 457-58, 467-473 (1935). Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish

its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. "The law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown, c. 46, Sec. 34 (8th ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards. For while under that system the accused is subjected to judicial interrogation, he is protected by the disinterestedness of the judge in the presence of counsel. See Keedy, The Preliminary Investigation of Crime in France, 88 U. of Pa. L. Rev., 692, 708-712 (1940).

In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken. We are deeply mindful of the anguishing problems which the incidence of crime presents to the States. But the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case. See, e. g., Radzinowicz, A History of English Criminal Law and its Administration from 1750, passim (1948). Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective * * *.

Mr. Justice Douglas concurring therein stated:

> Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw, as we did in Malinski v. People of State of New York, 324 U. S. 401, 65 S. Ct. 781, 89 L. Ed. 1029, and Haley v. State of Ohio, 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224, any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country.

In re: Refoule v. Ellis, 74 F. Supp. 336 (1947), the court held,

> Great stress is laid by defendants upon the fact that plaintiff accompanied them willingly and made no objection to answering questions, giving written and oral statements or submitted to polygraph tests. The evidence and the circumstances cast some doubt upon the real willingness of plaintiff and the voluntary character of his statements. They must be "in fact, voluntarily made", * * * Such alleged assent, if given may have been itself coerced and should be weighed in the light of a situation * * * inherently coercive.

In re: Vernon v. State, 6 Div. 460, 196 Southern 96, Supreme Court of Alabama, (1940),

> Extra judicial confessions of guilt by an accused on trial *for crime are prima facie involuntary*, and the burden rests upon the state to overcome this *prima facie* infirmity by evidence satisfactory to the court trying the case that the confession was voluntarily made, before such confession can be received in evidence. It is the right of the accused to controvert evidence offered in laying such predicate by cross-examination, or by evidence *aliunde*, but such counter-vailing evidence impeaching the predicate to be successful

must be offered on the *voir dire*, before the confession is admitted. Lockett v. State, 218 Ala. 40, 117 So. 45. Cook v. State, 16 Ala. App. 390, 78 So. 306; Pope v. State, 183 Ala. 61, 63 So. 71; Jackson v. State, 83 Ala. 76, So. 847.

If such contervailing evidence is not offered until after the preliminary question of the admissibility of the confession is passed on by the court it goes to the jury on the credibility of the confession only.

In re: Betts v. Brady, Warden, 316 U. S. 455, 62 S. Ct. 1252, (1942), the petitioner was indicted for robbery and was unable to employ counsel and so informed the Judge at his arraignment. The Judge advised him that it was not the practice to appoint counsel for indigent defendants save in prosecutions for murder and rape. The petitioner pleaded not guilty and was tried without a jury, found guilty and a sentence of 8 years imposed. While serving his sentence he petitioned for a writ of habeas corpus alleging that he had been deprived of his right to assistance of counsel guaranteed by the Fourteenth Amendment. The writ was issued, the cause was heard, his contention was rejected and petitioner was remanded. A second petition received the same fate. Petitioner applied to this court for certiorari and the writ issued to determine the jurisdictional question involved under Title 28 of the Judicial Code, Sec. 237. The issue before the court was whether the petitioner's conviction and sentence deprived him of his liberty without due process of law in violation of the Fourteenth Amendment because of the court's refusal to appoint counsel at his request. Mr. Justice Roberts for the court, amongst other things, and with reference to due process, stated:

The Sixth Amendment of the National Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such the specific guarantees found in the

> Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

And further said:

> The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right * * *

The judgment was affirmed.

Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy in said cause said:

> If this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the federal government. I believe that the Fourteenth Amendment made the sixth applicable to the states. But this view, although often urged in dissents, has never been accepted by a majority of this Court and is not accepted today. A statement of the grounds supporting it is, therefore, un-

necessary at this time. I believe, however, that under the prevailing view of due process, as reflected in the opinion just announced, a view which gives this Court such vast supervisory powers that I am not prepared to accept it without grave doubts, the judgment below should be reversed.

This Court has just declared that due process of law is denied if a trial is conducted in such manner that it is " shocking to the universal sense of justice" or "offensive to the common and fundamental ideas of fairness and right." On another occasion this Court has recognized that whatever is "implicit in the concept of ordered liberty" and "essential to the substance of a hearing" is within the procedural protection afforded by the constitutional guaranty of due process * * *

An historical evaluation of the right to a full hearing in criminal cases and the dangers of denying it were set out in the Powell case where this Court said: "What * * * does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. * * * Even the intelligent and educated layman * * * lacks both the skill and knowledge adequately to prepare his defense, even though we have a perfect one. He requires the guiding hand of counsel in every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

In re: Ashcraft v. State of Tennessee, 322 U. S. 143, 64 S. Ct. 921, footnote No. 8, it is stated;

State and federal courts, textbook writers, legal commentators, and governmental commissions consistently have applied the name of "inquisition" to prolonged examination of suspects conducted as was the examination of Ashcraft. See, e. g., cases cited in IV Wickersham Report, *supra*, and also pp. 44, 47, 48, and passim; Pound (Cuthbert W.), Inquisitorial Confessions, 3 Cornell L. Q. 77; Chambers v. Florida, 309 U. S. 227, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716; Bram v. United States, 168 U. S. 532, 544, 18 S. Ct. 183, 187, 42 L. Ed.

568; Brown v. Walker, 161 U. S. 591, 596, 16 S. Ct. 644, 646, 40 L. Ed. 819; Counselman v. Hitchock, 142 U. S. 547, 573, 12 S. Ct. 195, 202, 35 L. Ed. 1110; cf. Cooper v. State, 86 Ala, 610, 611, 6 So. 110, 4 L. R. A. 766, 11 Am. St. Rep. 84. In a case where no physical violence was inflicted or threatened, the Supreme Court of Virginia expressly approved the statement of the trial judge that the manner and methods used in obtaining the confession read "like a chapter from the history of the inquisition of the Middle Ages." Enoch v. Commonwealth, 141 Va. 411, 423, 126 S. E. 222, 225; and see Cross v. State, 142 Tenn. 510, 514, 221 S. W. 489, 9 A. L. R. 1354. The analogy, of course, was in the fact that old inquisition practices included questioning suspects in secret places, away from friends and counsel, with notaries waiting to take down "confession", and with arrangements to have the suspect later affirm the truth of his confession in the presence of witnesses who took no part in the inquisition. See Encyclopedia Britannica, Fourteenth Ed., "Inquisition"; Prescott, Ferdinand and Isabella, Sixth Ed., Part First, Chap. VII. The Inquisition; VIII Wigmore on Evidence, Third Ed., p. 307. "In the more serious offenses the party suspected is arrested, he is placed on his inquisition before the chief of police, and a statement is obtained. * * * Where the office of the district attorney is in political harmony with the police system, the district attorney is generally invited to be present as an inquisitor." 2 Wharton on Criminal Evidence, Eleventh Ed., pp. 1021-1022; and see Notes 5 and 6, *supra*.

An admirable summary of the generally expressed judicial attitude toward these practices is set forth in the Report of the Committee on Lawless Enforcement of Law, 1 Amer. Journ. of Police Science, *supra*, p. 587; "Holding incommunicado is objectionable because arbitrary—at the mere will and unregulated pleasure of a police officer. * * * The use of the third degree is obnoxious because it is secret; because the prisoner is wholly unrepresented; because there is present no neutral, impartial authority to determine questions between the police and the prisoner; because there is no limit to the range of the inquisition, nor to the pressure that may be put upon the prisoner."

Although the following cases, did not originate in the state courts but govern federal prosecutions, the reasons and opinions of the Justices ought to be applied to cases arising in state courts, if constitutional provisions and rules of criminal practice are to prevail.

In re: Gros v. United States, 135 F. 2d 878 (1943), (Circuit Court of Appeals), the appellant was sentenced for five years on an indictment charging him with being an agent of the German Government and failing to register in violation of Title 22 U. S. C. A., Sec. 233. The confession was signed on January 26, after questioning by several investigators for many hours daily over the five days. No friend or counsel was permitted to visit him while he was in prison. The only freedom from his confinement in his cell was in trips to a restaurant for his meals and to the office of the bureau for questioning. No bodily harm was inflicted other than the cell confinement and the continued pressure of questioning was without rudeness of manner. At the time of the trial the decision in McNabb v. U. S., 123 F. 2d 848 and Anderson v. U. S., 124 F. 2d 58 held that confessions procured as in this case were admissible against the charge of coercion of their procurement. No objection to the admission of appellant's confession was made at the trial court nor was it urged as error in appellant's brief. Eleven days before the hearing in this court the Supreme Court reversed these decisions. At this hearing, this court *sua sponte* noticed the manner in which the confessions were obtained. The respondent contended that such error though going to the vitals of a defendant's rights in a criminal case, could not be considered by an appellate court where not raised at the trial. Yet, however, in Wiborg v. U. S., 163 U. S. 632, 658, 16 S. Ct. 1127, 1137, 1197, the Supreme Court of the United States stated that,

> Although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.

The Appellate Court further held that,

> The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States Commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. *Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law.* Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy, which Congress has enacted into law,

and reversed the judgment.

Re: Garner, *et al.* v. U. S., 174 F. 2d 499 (U. S. Court of Appeals, 1949), (Writ of certiorari denied June 20, 1949, 69 S. C. 1502).

The Garners were convicted of murder and sentenced to death. The principal question is whether the court

erred in admitting the confessions which they made to the police before they had been presented to a committing magistrate. The appellants relied upon Upshaw v. United States, 1948, 335 U. S. 410, 69 S. Ct. 170. Appellants at the point of a pistol robbed a cab driver, took him into an areaway and shot him. George Garner confessed after he had been at headquarters for a period between three quarters of an hour and an hour and a half, and after he had been questioned only 30 minutes. Lawrence Garner was apprehended at 10:30 p. m., taken to headquarters and confessed at 2:30 a. m. The trial court in its charge to the jury said, amongst other things,

> If you find that either of defendants' alleged confessions or admissions was made under duress * * * you must disregard that confession or admission.

This rule is based on reason. Human experience has shown that it is not uncommon for persons to admit the commission of a crime that they have not committed, if they are under a physical, mental, or moral pressure or if they are acting as a result of an inducement or misrepresentation. The Appellate Court stated,

> It must be conceded, of course, that in the Upshaw opinion the McNabb rule is stated as being "that a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession if the result of torture, physical or psychological * * *' ", although the Court also said in the Upshaw opinion, "In the McNabb case there were confessions 'induced by illegal detention,' * * *." In view of that holding, we must consider it to be a settled principle that, when arresting officers unnecessarily delay taking a prisoner before a committing magistrate, any confession made to them during that delay is inadmissible; and that this is true even though the confession was not induced by the illegal detention nor by any form of coercion, but was voluntarily given.

Under this rule, however, there still remains open in every case the question whether the detention was illegal; that is, whether the delay in presenting the prisoner to a magistrate was unnecessary. For Rule 5(a) of the Federal Rules of Criminal Procedure does not command that an arrested person be taken before a magistrate "forthwith". It provides that the officer "shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the law of the United States." This phrasing envisages the possibility of necessary delay. It would be an extension of the Upshaw opinion to construe it as holding that a confession is inadmissible if given after delay in presenting the defendant to a magistrate because such a construction would completely ignore the word "unnecessary" in Rule 5(a).

It is still the law, we think, that necessary delay between arrest and presentation to a magistrate does not make inadmissible disclosures to the police during that delay. In this case the periods of delay between arrests and confessions were so short as not to have been *prima facie* illegal, even if the arrests had been made during daylight hours. Particularly is that true with respect to George Garner. It is our view also that the attendance of a committing magistrate throughout the night is not required.

The judgment was affirmed.

Circuit Court Judge Egerton dissenting, said,

I think the recent Upshaw case shows that these confessions should have been excluded. The Supreme Court said: "In the McNabb case we held that confessions had been improperly admitted where they were the plain result of holding and interrogating persons without carrying them 'forthwith' before a committing magistrate as the law commands. * * * We held that the plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to 'secret

interrogation of persons accused of crime.' * * * The McNabbs were not promptly taken before a judicial officer as the law required, but instead were held for secret questioning, and '(this questioning) took place while they were in the custody of the arresting officers and before any commitment was made.' The McNabb confessions were thus held inadmissible because the McNabbs were questioned while held in 'plain disregard of the duty enjoined by Congress upon Federal officers' promptly to take them before a judicial officer. * * * The Mitchell case * * * reaffirms the McNabb rule that a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological * * *.' * * *" We adhere to that rule.

These confessions should also have been excluded for a more fundamental reason. In Haley v. Ohio a confession had been obtained, as these confessions were, during a secret interrogation which lasted several hours and in which several policemen took part. The defendant was a Negro boy of 15. The Supreme Court reversed his conviction. Four Justices said: "The trial court, after a preliminary hearing on the voluntary character of the confession, allowed it to be admitted in evidence over petitioner's objection * * *. The court instructed the jury to disregard the confession if it found that he did not make the confession voluntarily and of his free will. But the ruling of the trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here. * * * The Fourteenth Amendment prohibits police from using the private, secret custody of either man or child as a device for wringing confessions from them." The due process clause of the Fifth Amendment prohibits this in the District of Columbia.

In re: Upshaw v. U. S., 335 U. S. 410, 69 S. Ct. 170 (1948), the petitioner was convicted of grand larceny in the United States District Court for the District of Columbia.

Pretrial confessions of guilt made during a 30-hour period of detention were admitted. Petitioner objected to the admission under Rule 5A of the Federal Rules of Criminal Procedure, which requires an officer making an arrest to take the arrested person without unnecessary delay before the nearest available committing magistrate and a complaint to be filed forthwith. The conviction was reversed under the McNabb ruling, where the U. S. Supreme Court held, (318 U. S. 332, 63 S. Ct. 614) that the purpose of the statute was a requirement of prompt arraignment to avoid secret interrogation of persons accused of crime. Mr. Justice Reed, the Chief Justice, Mr. Justice Burton and Mr. Justice Jackson dissenting held that, "If all confessions given during illegal restraint are excluded, it will shift the inquiry to the legality of the arrest and restraint rather than to whether the confession was voluntary, and that the true rule of the McNabb case is that,

> Purposeful, unlawful detention, illegally to extract evidence and successful extraction of confessions under psychological pressure, other than mere detention for limited periods, make confessions so obtained inadmissible.

In re: Akowskey v. U. S., 158 F. 2d 649 (1946), appellant was convicted of housebreaking and larceny in the United States District Court for the District of Columbia and appealed to the United States Court of Appeals. For determination was the applicability of the decision in McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608; two confessions were obtained from appellant who was arrested without a warrant around 4 o'clock p. m. and taken immediately to police headquarters where he was questioned continuously for 7 hours without being taken before the nearest U. S. Commissioner or jurisdictional officer as required by 18 U. S. Code, Sec. 595. Appellant was questioned continuously and around midnight made oral con-

fession later reduced to writing. Subsequent to this confession the appellant was taken to the premises where he made certain demonstrations. Committing magistrates and commissioners were available and appellant could have been arraigned. The court held that the detention was inexcusable and illegal and therefor the incriminating statements were inadmissible relying upon the case of U. S. v. Mitchell, 322 U. S. 65, 64 S. Ct. 896, being the base of the McNabb decision;

> Inexcusable detention for the purpose of illegally extracting evidence from an accused and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure.

Judgment was reversed.

In re: U. S. v. Carignan, 342 U. S. 36, 72 S. Ct. 97, (1951), respondent was convicted in the District Court for the territory of Alaska for first degree murder in attempting to perpetrate a rape. He was sentenced to death. The conviction was reversed by the United States Court of Appeals upon the ground that a confession was obtained contrary to the principles expounded by this court in McNabb v. U. S. and Upshaw v. U. S. The government secured a writ of certiorari and the question is: Was it error to admit at the trial the confession, and this Court held, amongst other things, that,

> The constitutional test for admission of an accused's confession in federal courts for a long time has been whether it was made "free, voluntarily, and without compulsion or inducement of any sort". However, this court in recent years has enforced a judicially created federal rule of evidence, to which the label "McNabb rule" has been applied, that confessions shall be excluded if obtained during "illegal detention due to

failure promptly to carry a prisoner before a committing magistrate, whether or not the "confession is the result of torture, physical or psychological".

Mr. Justice Douglas with whom Mr. Justice Black and Mr. Justice Frankfurter joined, concurred in the decision of the Court of Appeals as modified by this opinion stating,

I agree that the judgment of conviction was properly set aside. But my reason strikes deeper than the one on which the Court rests its opinion. There are time-honored police methods for obtaining confessions from an accused. One is detention without arraignment, the problem we dealt with in McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819. Then the accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient. In the McNabb case we tried to rid the federal system of those breeding grounds for coerced confessions.

Another time-honored police method for obtaining confessions is to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime. This is an easy short cut for the police. How convenient it is to make detention the vehicle of investigation! Then the police can have access to the prisoner day and night. Arraignment for one crime gives some protection. But when it is a pretense or used as the device for breaking the will of the prisoner on long, relentless, or repeated questionings, it is abhorrent. We should free the federal system of that disreputable practice which has honeycombed the municipal police system in this country. We should make illegal such a perversion of a "legal" detention.

The rule I propose would, of course, reduce the "efficiency" of the police. But so do the requirements for

arraignment, the prohibition against coerced confessions, the right to bail, the jury trial, and most of our other procedural safeguards. We in this country, however, early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police.

We are framing here a rule of evidence for criminal trials in the federal courts. That rule must be drawn in light not of the facts of the particular case but of the system which the particular case reflects. Hence, the fact that the charge on which this respondent was arraigned was not a minor one nor one easily conceived by the police is immaterial. The rule of evidence we announce today gives sanction to a police practice which makes detention the means of investigation. Therein lies its vice. Hence, we do not reach the question whether a confession so obtained violates the Fifth Amendment.

POINT B

Evidence indicating commissions of other offenses and criminal associations and events occurring after the event, suggesting sexual immorality, was improperly admitted into evidence.

The prosecutor produced June Hazan and Wyona Stouffer to testify for the state, (R. pp. 820-827-833), and this testimony was objected to upon the ground that it would bring before the jury testimony which would tend to inflame and prejudice them, and the objection was overruled.

The questions put to these two witnesses by the prosecutor and the answers obtained placed before the jury evidence of immoral activity, evidence indicating commissions of other offenses unrelated to the material issue, seriously and substantially prejudicing DeVita.

WYONA STOUFFER (State's witness) (R. pp. 827-833)

Q. Where did you and Silvio go after Silvio registered, if anywhere.

Mr. McGlynn: Now I seriously object, your Honor. Your Honor said you thought the testimony might be admissible for the purpose of identification. Certainly they have seen one another long enough now so that any foundation for identification has been amply laid. If we are going into the details, from now on I say I will be seriously and substantially prejudiced.

The Court: I sustain the objection to that question.

In the State's brief to the New Jersey Supreme Court on page 79 (c), as to the evidence of defendant's activities, after the crime, the State said,

"Wyona Stouffer testified that she stayed overnight in a hotel with defendant", (DeVita),

and in the transcript (R. p. 832) in answer to the state's question.

After you had breakfast, did you receive anything from the defendant, DeVita? A. Yes, I did.

Q. How much? A. $100.

In re: State of N. J. v. De Paola, 5 N. J. 1, (1950), the Appellant was convicted in the County Court of murder in the first degree with recommendation of life imprisonment. It is charged that the examination conducted by the prosecutor constituted error since it was an attempt to show the commission of a criminal act by defendant for which he had not been convicted and which were not connected in any way with the indictment for murder on which he was being tried. Defendant took the stand on his own behalf and on cross-examination admitted he had been convicted of crime. He was then asked if he had not on various occasions made out applications for liquor licenses under oath wherein he had given a false answer to the question whether he had ever been convicted of crime. This

series of questions was strenuously objected to but the State was permitted to show and the witness was compelled to answer that this false swearing occurred in each year year from 1941 to 1948. *Following this line of attack, the prosecutor in his summation pointed out that the false swearing had occurred over a period of eight years.* Defendant had not been convicted for perjury or false swearing. The state contended that the matter was within the discretion of the trial court and that the objected testimony was permissible to show lack of veracity. The Supreme Court of this State held,

> On the trial of an accused for a crime it is not competent to prove that he committed other crimes of a like nature for the purpose of showing that the accused would be likely to commit the crime charged in the indictment. * * * There is a class of cases in which the knowledge, good faith, motive or intent of a party is material, on which evidence collateral to the main subject is sometimes admitted; but the competency of such evidence is limited to facts which are so connected with the subject in controversy as to make it apparent that the party had a common purpose in both transactions. * * * But on the trial of a criminal charge it is not relevant to show that the defendant has committed other similar crimes which are not connected in any way with the one in question.

The admission of the testimony was reversible.

In re: People v. Nuzzo, 294 N. Y. 227, (1945), as part of their main case, the People called as a witness Mrs. Jennie C. Utter who testified over objection and exception that she made trips with defendant and that on each one of these trips she stayed in a hotel with defendant. The circumstances disclosed by her examination principally suggested that her relations with defendant were improper. The Attorney General asserted that the evidence was adduced solely to discredit defendant's claim that local funds

had been used for Union purposes. Defendant was charged with the crime of grand larceny and was convicted. The court held,

> It is the established rule that specific acts of a defendant in a criminal trial, unrelated to the offense with which he is charged but tending to show his bad character, may only be proven by his own admissions on cross-examination if he chooses to give testimony and then only to the extent that such acts tend to impeach his credibility as a witness. * * * Nor does he put his general character in issue by taking the stand unless he introduces affirmative proof of good character. * * * These rules of fundamental fairness in the protection of the individual against unjust prosecutions are inflexibly enforced in our courts. * * * At no stage of the trial in this case could the testimony of Mrs. Utter that she made several extended trips with the defendant, at his expense and under circumstances highly suggestive of improper relations, have been properly received in evidence.

In re: State of New Jersey v. Schmieder, 5 N. J. 40, the court held,

> As a general rule on the trial of a criminal charge it is neither competent nor relevant to show that the defendant has committed other crimes unconnected in any way with the one in question.

DeVita was being tried on a homicide indictment, unrelated to any crime of passion. The State injecting testimony of these two women, June Hazan and Wyona Stouffer, did the same for a purpose which may be concluded from the prosecutor's summation to the jury, when he said (R. p. 1136) in referring to DeVita,

> Then they went to the Moroccan Village Club. Conscience? Conscience-stricken? With two dames? You use your own inferences to what type they were.

And in the prosecutor's cross-examination of DeVita (R. p. 935),

Q. Why did you separate that evening? A. Because I was going to sleep with someone.

Mr. Giuliano: If your Honor please, I did not expect that answer. I move that it be stricken.

The striking thereof was proper, but it indicated that the prosecutor knew the question, answer and proof were improper.

The Supreme Court in State v. Grillo, 11 N. J. 173, Advance Sheet Reports, No. 7 (1953) on p. 183 said, concerning this evidence,

> The evidence of matters subsequent to the robbery-killing was admissible to prove the disposition of spoils of the robbery—and the fact that the evidence incidentally disclosed immoral activity, does not require its exclusion.

Notwithstanding the aforegoing, it is contended that DeVita's constitutional rights were violated and he was not accorded the fundamentals of due process in the trial, and the injection of these offenses and events occurring after the event was highly prejudicial to him.

POINT C

DeVita's rights were prejudiced by the inflammatory remarks of the prosecutor to the effect that defendants were members of an organized criminal group and that the statute providing for recommendation of life imprisonment was not intended to apply to him, expressed in the opening, the summation and during the course of the trial.

The remarks of the prosecutor in the opening, during the proceedings and in the summation were so gravely prejudicial and so completely infected the atmosphere of the whole trial, that they could not be cured by a proper charge.

Improper statements, assertions of personal knowledge, carry great weight against an accused. Jurors in the well-known phrase of Holmes and Hughes, J. J. are "extremely likely to be impregnated by the environing atmosphere".

In continuance of the prosecutor's opening to the jury (R. p. 257), the prosecutor stated,

> The State asks you ladies and gentlemen to remember what the Legislature said, that the penalty for first degree murder in this State is death, unless the jury, upon and after a consideration of all the evidence, attaches to that verdict a recommendation for life imprisonment. We say—the State says—this is the kind of case the Legislature had in mind when it said that the penalty for first degree murder is death.

In his summation, the prosecutor (R. pp. 1115-1140) said,

> As I recall the law, being a former member of the Legislature, the punishment originally for first degree murder was death. At that time, or many years later, there was an agitation that death should not be the punishment in every case. Then the Legislature in its wisdom said: "We will give the right to a jury, if they so feel upon and after consideration of all the evidence, to recommend life imprisonment." This is not the type of case the Legislature had in mind when it gave jurors the right upon and after consideration of all the evidence to attach the verdict of guilty of murder in the first degree a recommendation of life imprisonment.

Continuing the prosecutor said (R. p. 1121),

> But what were Grillo and his associates doing while our boys were dying in Korea. He was riding back and forth from Florida, collecting souvenirs. What contributions is Grillo and Co. making to Democracy?

And further the prosecutor, continuing in his summation, said (R. p. 1124),

> The Associates Incorporated: Rosania, DeVita, Grillo, Cardone, Aulisi, Mucci, Angelo, Petrucci, Pontilla, the Associates Incorporated. Why, they would stick you up Mr. Juror No. 6, and you, Mrs. Garrabrant, and

you, Mr. George. Talking about places. Yes, they would stick me up because they don't care what position you hold; they have no respect for this uniform, no respect for the badge, no respect for enforcement agents.

And continuing the prosecutor said to the jury (R. p. 1124),

You and I, Mr. Gieser, start off with our briefcases in the morning with matters pertaining to our business. So did Grillo and Company with a briefcase, carrying it through the streets with their tools, which they were going to use in their business.

And continuing (R. pp. 1131-1132) the prosecutor said,

Something has been said about life imprisonment. It has been mentioned that it means twenty-five years in state's prison. The law provides that; but the law also provides that a man who is sentenced to life imprisonment can be given time off and is entitled to it under the law. A man or a person sentenced to life imprisonment is subject to parole under our law after serving 14 years and a few months. Counsel say: "Give them a chance". Do you want to take a chance with them? Go ahead. Do you want them back in circulation after 14½ years? Go ahead. Do you want to get rid of them forever? Return a verdict of guilty of murder in the first degree. Give Grillo a chance to go out again 14 years hence? Give his associates the same chance? Why?

And the prosecutor continuing (R. p. 1138) said,

Selling and purchasing guns which are a menace to the community, passing them around as if they were toothpicks, buying masks, bullets, preparing themselves, carrying this bag from place to place, as has been testified, pulling this daring stickup during the height of the evening traffic, with no regard for authority, no respect for a uniform, interested in one thing, money, regardless of who gets hurt.

And the prosecutor continuing said,

Counsel says, "Give them a chance." Do you want to take a chance with them? Go ahead. Do you want them back in circulation after fourteen and a half years? Go ahead. Do you want to get rid of them

forever? Return a verdict of guilty of murder in the first degree. Give Grillo a chance to go out again fourteen years hence? Give his associates the same chance? Why? What chance and what consideration did they give Jim Law? It is for you to answer.

(R. p. 1133) Now, are you going to believe Lofrano, or are you going to believe a member of Associates, Incorporated?

(R. p. 1137) Silvio DeVita hands her a hundred dollars.

(R. p. 1138) I think I have said enough. You have the exhibits. Selling and purchasing guns, which are a menace to the community, passing them around as if they were toothpicks, buying masks, bullets preparing themselves, carrying this bag from place to place, as has been testified, pulling this daring stickup, during the height of the evening traffic, with no regard for authority, no respect for a uniform, interested in one thing, money, regardless of who gets hurt.

(R. pp. 1139-1140) Now, what are we going to do about it? Counsel said this is no deterrent or won't be any deterrent if you send these men to the chair. Well, I don't know anything that is more terrifying to the youth of America, to the youth of our community than to read at the end of this week, after the Court has charged you, that three hoodlums, three men who defied the law, who became desperadoes, walked down Broad Street with loaded revolvers, committed a murder, and the jury said to them, "Grillo, DeVita, and Rosania, we'll show you as much consideration as you showed Law, and that's none. We'll be as merciful to you as you were to Jim Law."

I say your verdict can be a deterrent, your verdicts can go from this building throughout the breadth of this county and say to all, young and old, "The citizens of Essex County will not tolerate hoodlums like you going around on our streets, taking the lives of decent citizens."

(R. p. 1140) This is the type of case that the Legislature had in mind when it said that persons convicted of first degree murder shall suffer death. If you don't

think so, thumb your nose at the Legislature. I don't care. But if you believe in law and order, you will return a verdict of guilty of murder in the first degree against each and every defendant on trial. And I urge through your foreman, whoever he or she may be, that you will come out with your heads erect, look the defendants straight in the eye, and have the courage of your convictions, and that you will say to them, "We the members of this jury find you, Grillo, DeVita, and Rosania, guilty of murder in the first degree."

(R. p. 1117) Let me say in all sincerity, ladies and gentlemen, that if I had recommended to this court the acceptance of a plea on a grandstand play that was made by counsel in this case and had been untrue to my trust, and you, Mr. Gieser (a juror) would have a right to criticize the prosecutor, Mr. Congleton, in recommending the acceptance of such a plea, and so would you, Mr. George, (a juror) and so would the newspapers, have a right to condemn and criticize not only myself, but the prosecutor of this county in recommending to this court the acceptance of a plea of *non vult* to a murder of this type. In my judgment the law would not permit it.

The Supreme Court in State v. Grillo, above cited, 11 N. J. 173, on p. 184, stated,

> The Canons of Professional Ethics restating legal theorem that the primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done (Canon 5).

However, the prosecutor was charged by statute as follows:

> Each prosecutor of the pleas shall be vested with the same powers and subject to the same penalties, within his county, as the attorney general shall by law be vested with or subject to, and he shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the law.

> "It was his duty to prosecute with earnestness and vigor circumscribed with the obligation to refrain from improper methods. Though the statements were strong

> and forceful and the language used in referring to Legislative intent was crude the prosecutor confined himself to the evidence. Viewed in the light of the charge of the trial court they do not constitute ground for reversal".

The prosecutor went beyond the scope of proper comment and the reasons advanced by Mr. Justice Heher in his dissenting opinion in State v. Grillo, 11 N. J. 173, pp. 192-193 are adopted and reiterated herein by DeVita.

It was said *in re:* Beck v. U. S., (Circuit Ct. of Appeals) (1929), 33 F. 2d 107,

> A trial in the United States court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, is of greater value to society than a record for convictions.

> The Supreme Court of the United States has very recently reversed a case because of improper argument by counsel. Although the case was one to which the government was not a party, the court spoke in strong language:

> > "But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy, * * * of no importance to the public.' The State, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, *uninfluenced by the appeals of counsel to passion or prejudice.* See Union Pac. Ry. Co. v. Field, (C. C. A.) 137 F. 14, 15; Brown v. Swineford, 44 Wis. 282, 293, (28 Am. Rep. 582). *Where such paramount considerations are involved,*

the failure of counsel to particularize an exception will not preclude this Court from correcting the error. Brasfield v. United States, 272 U. S. 448, 450, 47 S. Ct. 135 (71 L. Ed. 345)." New York Cent. R. Co. v. Johnson, (No. 455, Apr. 8, 1929) 49 S. Ct. 300, 73 L. Ed.—. The conduct of this case, in itself, requires a reversal under this decision.

In re: Hemphill v. State, 165 W. 462, (Court of Criminal Appeals of Texas (1914), the bill of exception recited that the prosecuting attorney in his closing argument to the jury stated that, "Unless they assessed the death penalty in this case the people would take the law in their own hands in the future and that such rape fiends as defendant would be dealt with at the hands of a mob." Also,

"It would be much worse convicting an innocent man for you to turn this defendant loose."

We do not know of a worse condition that could possibly arise in a civilized community and in the enlightened jurisprudence of this country than the proposition to convict an innocent man rather than turn this defendant loose. If he should be innocent, then under this statement of the district attorney *it would be better to convict him than to turn him loose for fear that in a week or two one of the wives, daughters, or sisters of some juryman might be insulted.* Expressions like this should not be indulged in a courtroom, and should not be approved by either the trial or appellate court. The courts of this country cannot subscribe as a part of its jurisprudence that it is worse to convict an innocent man than to return a verdict of not guilty against an accused person. In other words apply that directly to this case: It would be worse to turn this defendant loose for fear he might ravish somebody else than it would be to convict him though he be innocent. *If prosecuting officers will continue to make such appeals and to use such arguments,* if they be arguments, before a jury, it will be the duty of this court at all times under such circumstances to reverse the judgment, and see that the accused is convicted only under the due process of the law of the land.

The judgment is reversed.

In re: Commonwealth v. Capalla, 185 A. 203, S. Ct. of Pa. (1936) defendant was tried on an indictment charging him with murder. The jury returned a verdict of voluntary manslaughter. The second assignment of error is based on the court's overruling defendant's objection to the District Attorney's closing speech as follows:

> If the court please, I want to put on the record, the statement that the District Attorney had made when he said, "There is no reason ever for shedding human blood except in war."

After overruling this objection the trial judge said,

> "We think the argument of the District Attorney is deducible from the evidence in this case, and the question of what the evidence is, is a question for the jury to determine as we will instruct them in our general charge." The statement, "there is no reason for shedding human blood except in war," was wholly unwarranted. It is well settled that to kill another, if it is necessary to do so in order to protect one's life or limb, or to save one's self from great bodily harm, or under circumstances reasonably giving rise to fear of such injuries unless one kills one's assailant, is justifiable homicide.

The Supreme Court of Pennsylvania held,

> In the instant case there was a clearly defined issue of self-defense and it cannot be held that the statement of the district attorney, which when called to the court's attention was apparently acquiesced in by the latter, does not amount to reversible error. A statement *of that kind the jurors are quite likely to recall, in their deliberations, more vividly than they recall the formal correct expressions in the judge's charge.* Such a statement, when not properly taken care of by the court, *can be highly prejudicial to a man on trial for his life or liberty.* The second assignment of error is sustained.
>
> The third assignment of error is based on the court's overruling defendant's objection to the district at-

torney's closing speech. This episode appears on the record as follows: "He (the district attorney) pointed to the defendant and *called him a 'cold blooded killer'* and I ask, for that reason, that a juror be withdrawn." The motion was overruled. This assignment of error is sustained.

It is no part of a district attorney's duty, and it is not his right, to stigmatize a defendant. He has a right to argue that the evidence proves the defendant guilty as charged in the indictment, but for the district attorney himself, *to characterize the defendant as a "cold blooded killer" is something quite different. No man on trial for murder can be officially characterized as a murderer or as "a cold blooded killer," until he is adjudged guilty of murder or pleads guilty to that charge.* This court stated in Com. v. Nicely, 130 Pa. 261, 270, 18 A. 737, 738: "The district attorney is a *quasi* judicial officer. * * * He should present the commonwealth's case fairly, and should not press upon the jury and deductions from the evidence that are not strictly legitimate. When he exceeds this limit, and in hot zeal seeks to influence them by appealing to their prejudices, he is no longer an impartial officer, *but becomes a heated partisan.*" In Com. v. Bubnis, 197 Pa. 542, 550, 47 A. 748, 749, this court said: "In his official capacity, clothed with the gravest responsibilities, and exercising functions in a measure judicial, the district attorney should ever be cautious in expressing to a jury his belief in the guilt of the accused. If convinced of it, his duty is to lead them to his own judgment by pointing out to them, intelligently and impartially, the evidence which cannot fairly justify any other conclusion." In Com. v. Swartz, 37 Pa. Super. 507, that court held that where a district attorney in cross-examining a witness, after the witness had answered a question, said, "That is a lie," and opposing counsel made objection, the court should have granted the request that a juror be withdrawn and the case continued. In Com. v. Ronello, 251 Pa. 329, 96 A. 836, the district attorney stated, "My own honest conviction is that he (the defendant) did that dastardly deed." This court, in an opinion by Mr.

Justice Stewart, characterized the district attorney's remarks as "wholly inexcusable, and so violative of the prisoner's right to a fair trial on the evidence submitted, and that alone," and said that the cautioning of the jurors by the trial judge to disregard the district attorney's remarks "was wholly inadequate to the protection of the defendant's rights," and "could give no assurance that the prejudice otherwise certain to result to the defendant had been averted."

There is very slight, if any, difference in the character of the statement condemned by this court in the last-mentioned case and the statement complained of in this case, to wit: that the defendant was "a cold blooded killer." This latter statement was equivalent to an expression of belief on the part of the district attorney that the defendant was guilty of murder in the first degree. There are no facts in the record warranting any such belief on the part of any one, and even if there were, the first officials who had the right to give expression to that belief were the jurors after the case was committed to their keeping. *The application of epithets to a defendant on trial, and expressions of personal belief in a defendant's guilt have no legitimate place in a district attorney's argument. A closing argument can be strong and convincing without them.* They are not found in those models of courtroom prosecuting addresses which have come down to us from the great lawyers of earlier generations.

The due administration of justice requires that every public official in the discharge of his duties keep within the orbit legally assigned him.
The judgment is reversed and a *venire facias de novo* is awarded.

In re: 53 Am. Jur. Trial, p. 371, Sec. 465.

Thus, in a criminal prosecution an attorney for the state may properly appeal to the jury to perform their full duty in enforcing the law; in so doing he may advance any legitimate considerations likely to instruct them in the performance of their duty and in the importance of enforcing the law, and may make remarks

illustrating the evil consequences which might result from their failure to perform their duty. *But while a prosecuting attorney may warn the jury to perform their duty, he may not indulge in argument calculated to arouse in them fears of public disapproval, or of being recreant in their duty, and which on that account tends to coerce them into a verdict of conviction.* Thus, to state that a verdict other than that sought by the prosecuting attorney will subject the jury to scorn or contempt is improper. Likewise, appeals to the jury to hang the defendant because a mob has failed to do so or references to the probability that an acquittal of the defendant will encourage mob violence are universally condemned.

Coercion of the jury by admonitions against compromising upon a verdict carrying a lesser penalty than that incident to the offense or degree of offense of which the defendant is shown to have been guilty is not proper, although only in a very few cases have the courts held that argument of this nature is sufficient ground for disturbing the conviction, especially where the jury has been cautioned against being influenced by such language.

In re: People v. Rechichi, 284 N. Y. S. 653 (1935). (The Supreme Court, Appellate Division, 4th Department), 246 App. Div. 679, in his cross-examination of defendant, the experienced District Atttorney so phrased many of his questions as to accuse defendant of having committed several serious crimes other than the one for which he stood charged. Later, in his summation to the jury, the prosecutor forcefully repeated these accusations. In any criminal case, however convinced of the guilt of the accused may be, the guaranty of a fair trial under the law of the land still exists and should be enforced.

In re: People v. Esposito, 224 N. Y. 370, (1918), defendant was convicted of murder in the first degree, the court held, that it was the duty of the court and of the District

Attorney to see to it that his fate which hung in the balance for so long was not prejudiced or settled by any forbidden or untoward methods. It was immaterial that one might think that defendant was guilty of the highest crime of which he could be convicted and that there was no danger that such a conviction would result in meting out to him greater punishment than he deserved. Such thoughts as these, if they existed, had no place in the presence of that fundamental principle of our jurisprudence that a man shall not be punished for an act, however abhorrent and criminal it may seem to be, until he has been justly and fairly convicted.

In re: People v. Johnson, 284 N. Y. 182, (1940), defendant was convicted of crime of murder in the first degree. In questioning the prospective jury the District Attorney stated that in case of a verdict of guilty of murder in the first degree defendant had a right of appeal to the Court of Appeals and a final appeal to the Governor of the State of New York, who had the power to commute the sentence to life imprisonment, and in summing up the District Attorney made a like assertion. The court held that,

> The vice of the statements and questions of the District Attorney lies not primarily in the incorrectness of the statement that an appeal to the Court of Appeals is compulsory but in the suggestion that the jury's verdict, if against the defendant, cannot be seriously harmful to him because of the opportunities for review. This suggestion is fundamentally unsound and vitiates the trial. No element of our judicial process must be more carefully protected than the function of the jury. The jury has nothing to do with appeals and applications for clemency. They lie in a wholly different field. The jurors have task enough to find the truth and proclaim it by their determination without regard to ultimate consequences. Nothing can be permitted to weaken the jurors' sense of obligation in the performance of their duties.

The judgment of conviction was reversed.

In re: Robinson v. U. S., 32 F. 2d 505, Circuit Court of Appeals, (1929), the United States Attorney in arguing the case before the jury used the following language:

> Gentlemen: Jim Robinson was an agent in the government service for five years. He made many cases, so he says, yet in only one case did he ever get into court. Why? What was wrong with this man's cases that they did not go to trial?

The court held:

> This argument was entirely outside of the testimony * * * The purpose of the district attorney in using this language was to leave the impression with the jury that Robinson had been taking bribes to suppress evidence in other cases, which he had investigated.
>
> This was not all. The government attorneys in the argument, in an impassioned and impressive way, appealed to the jury to convict Robinson, because he was a government agent, and urged that a failure to convict him would be an evidence in the eyes of the public and other government officials that juries would not convict men engaged in the government service. At the same time the impression was left that the failure of the jury to convict Robinson would, in a measure, be a condemnation of the conduct of the district attorney and his assistant in handling the Marsh case. * * * The language used was, in many respects, not justified by the evidence, and was highly prejudicial to the defendant.
>
> There are times when no admonition or instructions of the court can remove from the jury's mind the effect of improper conduct and remarks of counsel, and we think this is true in this case.

The judgment for conviction for accepting a bribe was reversed.

In re: U. S. v. Nettl, 121 F. 2d 927, Circuit Court of Appeals (1941) the Court held,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a so-

> vereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one,

taking the language from Berger v. U. S., 295 U. S. 78, 55 S. Ct. 629.

In re: State v. Little, 228 N. C. 417, (S. Ct. of N. C.), (1947), the court held,

> Under the law, the right of a person, put on trial upon a criminal charge, to be heard, and to have counsel in all matters necessary to his defense, and the right of counsel to argue to the jury the whole case, as well of law as of fact, is declared by this Court to be too fundamental for discussion. * * * Wide latitude is given to the counsel in making their arguments to the jury. * * * However, counsel may not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. * * * When counsel does so, it is the right and duty of the presiding judge to correct the transgression,—and he may do so at the moment or wait until he comes to charge the jury.

In American Law Reports, Annotated, 132 A. L. R. 679, Appeal and Error, page 681, it is stated;

> Where, in the prosecution of a defendant convicted of murder the District Attorney in his closing argument to the jury stated that, "If you acquit this defendant you set free the foul murderer of an innocent young girl, and the law can never lay his hands on him again: but if you should convict him and in doing so, should by mistake convict an innocent man, then he has his

> right of appeal, and the court of appeals will reverse the case and give defendant a new trial, and no injury will be done."

This was held to be reversible error. On page 689 it is stated;

> Permitting a prosecutor to refer in his jury argument to statistics showing an unusually large recent number of murders in the state and to argue therefrom that the law was laxly enforced, that defendant should be found guilty of murder without recommendation of mercy (which meant the death penalty) and that a life sentence would be almost a farce because he would be eligible for parole after three years, was held prejudicial to one convicted of murder and sentenced to death.

In re: State of New Jersey v. Grillo, 11 N. J. 173, Mr. Justice Heher stated,

> And, on the crucial issue of whether the judgment should be death or life imprisonment, the trial prosecutor in his closing argument transgressed the substantial rights of the accused under the statute. He said:
>
> "As I recall the law, being a former member of the legislature, the punishment originally for first degree murder was death. At that time or many years later, there was an agitation that death should not be the punishment in every case. Then the legislature in its wisdom said: We will give the right to a jury, if they so feel upon and after consideration of all the evidence, to recommend life imprisonment. This is not the type of case the legislature had in mind when it gave jurors the right upon and after a consideration of all the evidence to attach to their verdict of guilty of murder in the first degree a recommendation of life imprisonment.
>
> "This is the type of case that the Legislature had in mind when it said that persons convicted of first degree murder shall suffer death. If you don't think so, thumb your nose at the Legislature. I don't care. But if you believe in law and order, you will return a verdict of guilty of murder in the first degree against each and every defendant on trial."

This served to deny the accused the essence of a fair trial of the issue of life or death as the punishment for the crime of which they were convicted, such as was within legislative contemplation. Thereby, the prosecutor drew upon his experience as a legislator for a legislative intention that is not to be found in the enactment itself. He declared that the instant case was not within the class the Legislature had in view; *e contra,* that the Legislature had death "in mind" for cases of this type, and "If you don't think so, thumb your nose at the Legislature." It was the natural tendency of this argument, ill-founded in fact as it was, to coerce the jury into prescribing death as the punishment supposedly to conform to the legislative intention and thus to avoid public opprobrium for not doing so.

POINT D

The trial court committed error in refusing to charge the jury that intent is an element of robbery (DeVita's request to charge No. 41) and in charging the jury on the subject of recommendation of life imprisonment.

DeVita submitted Request No. 41 (R. p. 1172),

> If the evidence or lack of it leaves a reasonable doubt in your minds that Silvio DeVita had the criminal intent to commit robbery, then he is not responsible for the ensuing death of James Law and you must acquit him.

In re: People v. Marendi, 213 N. Y. 600 (1915), to justify a conviction of murder in the first degree for an unintentional homicide on the ground that it was committed while the defendant was actually engaged in the commission of a felony, every essential element of the latter crime must be established by evidence not left to be guessed at.

In re: Minner v. U. S., 57 F. 2d 506, (1932), the government has the burden of establishing every essential element of an offense including criminal intent.

The Supreme Court in the reported case of State v. Grillo, on page 185 stated,

> The State admits that felonious intent is an essential element of the crime of robbery, but argues that it was not necessary to instruct the jury in the language requested by DeVita.

The court charged:

> In this case the State contends that the three defendants aided and abetted in the robbery perpetrated upon James Law. The state further contends that during the perpetration of the robbery James Law was shot and killed by defendant Grillo. That contention, of course, raises the question of the criminal responsibility of the defendants DeVita and Rosania. If you find beyond a reasonable doubt that they or either of them abetted the robbery * * *

And the court further charged:

> It makes no difference that DeVita did not fire the shot that killed James Law nor that Ralph Rosania was not on the scene of the actual killing if you find beyond a reasonable doubt that either or both of them, as the case may be, aided and abetted in the planning of the robbery.

Mr. Justice Heher in his dissenting opinion stated:

> I do not concur in the view that the trial judge in substance charged the jury that "a criminal intent to commit robbery" was an essential ingredient of the statutory offense of murder in the first degree laid to the accused in the indictment, and so the request for an instruction in this regard interposed by the defendant DeVita was properly refused as unnecessary, and that, at all events, the question of intent was not at issue, for there was "no claim on DeVita's behalf" in the opening statement to the jury made by his counsel "that he did not intend to commit the robbery."
>
> The judge instructed the jury that "the statute makes no mention of the element of the intention to kill in connection with a killing which shall be committed in

perpetrating a robbery," and in cases "where death ensues from the commission of a robbery, the commission of the robbery is regarded as standing in the place of, or as the legal equivalent of, the wilfulness, deliberation, and premeditation required under the statute, and therefore the State is not under a duty to prove wilfulness, deliberation, and premeditation where it has proved that a killing has been committed during the perpetration of a robbery." But there was no reference whatever to the indispensable requisite of an intent to commit the basic crime of robbery and of DeVita's participation in that intent, if the offense was to constitute murder in the first degree.

The State differentiates in this regard between proof of a robbery as the substantive offense charged and murder in the commission of a robbery. Conceding that in the former case "felonious intent" is an element of robbery to be proved, the insistence is nevertheless that in the latter case proof of "wilful intent to kill, deliberation and premediation is dispensed with, and in its place is substituted the proof of *the commission of the robbery.*" (Italics the State's.) I do not perceive the distinction. Where it is charged that the killing was done in the perpetration or attempted perpetration of one of the enumerated statutory felonies, proof of an intent to kill, deliberated and premeditated, is of course unnecessary; but, by the same token, it is requisite that there be proof of an intent to commit the underlying statutory offense.

The State had the burden of proof of all the essential elements of murder in the first degree; and, while a murder committed in the perpetration or attempted perpetration of a robbery is murder in the first degree under the statute, irrespective of the intent and mental operations otherwise essential to an offense of that degree, proof of the "commission of the robbery" *ex necessitate* involves the felonious intent which is a constituent of that offense. It would seem to be axiomatical truth that there cannot be a conviction of murder in the first degree for a killing in the perpetration or attempted perpetration of an offense of the statutory class, unless all the elements of the basic crime be established as on the trial of an indictment for that offense alone.

In re: State of New Jersey v. Bunk, 4 N. J. 461, Mr. Justice Heher stated;

> It is the absolute right of the accused in a criminal case to have the jury distinctly instructed on a principle of law material to the issue; and a refusal to charge a specific request embodying the principle is reversible error unless the subject matter has been charged in substance.

The trial court (R. p. 1145) charged the jury,

> You will note that the statute makes no mention of the element of the intention to kill in connection with a killing which shall be committed in perpetrating a robbery. In cases where death ensues from the commission of a robbery, the commission of the robbery is regarded as standing in the place of, or as the legal equivalent of the wilfulness, deliberation and premeditation required under the statute, and therefore the state is not under a duty to prove wilfulness, deliberation and premeditation where it has proved that a killing has been committed during the perpetration of a robbery, which is the contention of the state in this particular case;

and the trial court further stated (R. p. 1153),

> Now I have already indicated to you that under our law in this state, so far as the guilt or innocence of these defendants is concerned, intent, premeditation to kill is not an essential element.

The trial court further stated to the jury, (R. p. 1157),

> A conspirator cannot escape responsibility for an act which is a natural result of a criminal scheme which he helped to devise and carry forward.

DeVita was being tried for a homicide arising out of a robbery and was charged by the Grand Jury with the willful, felonious and malicious killing, in the indictment (R. pp. 226-227). The crime of conspiracy is R. S. 2A:98-1, 2, under the Law of New Jersey, is a substantive independent crime and is a misdemeanor, the punishment being by a

fine of not more than $1,000 or by imprisonment for not more than 3 years, or both. The jury ought not to be allowed to judge which is right between two conflicting statements of law.

The court further charged the jury (R. p. 1149),

> As the evidence unfolded in this case, certain facts seemed to be, if not admitted, seemed to be not controverted.

The presumption of innocence continues throughout the trial and this charge substantially deprived DeVita of this fundamental right. *In re:* Konda v. United States, 166 F. 91 (Circuit Ct. of Appeals, 1908), the court stated,

> In our judgment, however, a defendant in a criminal case has the absolute right to require that the jury decide whether or not the evidence sustains each and every material allegation of the indictment. *Material allegations are allegations of fact.* And each, as much as any other, enter into a verdict of guilty. If the judge may decide *that one or another material allegation is proven, he may decide that all are proven, and so direct a verdict of guilty.* In a civil case, the judge may exercise the power of directing a verdict for the plaintiff when there is no conflict in the evidence and the only inference that can be drawn by reasonable minds as to the ultimate facts in issue favors the plaintiff. This power, we opine, grew out of the practical administration of the fundamental power to review, on a motion for a new trial, the findings of the jury. In the civil case above supposed, if the jury should return a verdict for the defendant, the judge would set it aside; and he would continue to set aside verdicts in that case until one should be returned that was in accord with the undisputed facts. So he cuts off the possibility of useless verdicts by directing in the first instance the jury to return the only verdict he will let stand. But in a criminal case, if the jury returns a verdict for the defendant, the judge, no matter how contrary to the evidence he may think the verdict is, cannot set it aside and order a new trial. *Therefore, since the judge is without power to review and*

overturn a verdict of not guilty, there is no basis on which to claim the power to direct a verdict of not guilty. Our conclusion is that an *accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment in the indictment, if the evidence against him is clear and uncontradicted,* as he unquestionably would have *if it were doubtful and conflicting.* Inasmuch as jurors are rightly trusted, in close and difficult cases, to maintain the peace and dignity of organized society, surely they may be relied on in the plain and simple ones.

The court further charged, (R. p. 1161),

> The statutory punishment for first degree murder is death, subject only to the condition that the jury in its absolute discretion chooses to recommend imprisonment at hard labor for life; a recommendation shall not be made, however, except after consideration of all the evidence and by incorporating the recommendation in the verdict of guilty. If that condition does not arise, the penalty is death, *determined not by the jury but by the statute* and pronounced by the court. *It is not correct to say that the jury imposes a sentence of death where it does not choose to make the recommendation for life imprisonment.*

The statute R. S. 2A:113-1, 2, 3, 4 is set forth in the appendix. Mr. Justice Heher in his dissenting opinion *in re:* State of New Jersey v. Bunk, 4 N. J. 461, referring thereto, said,

> It would seem to be fundamental in the statute that there be unanimity both as to guilt and punishment before a verdict of murder in the first degree can be returned by the jury. The *legislative purpose plainly was to assign to the jury the determination of the question of which of the alternative punishments should be exacted where guilt is established,* and thus to temper the strictness and severity of the old law. It would not be a realistic appraisal of the statute so to construe the expression as to permit a finding of murder in the first degree to stand, unmodified by a recommendation of life imprisonment and so sufficient to sustain a judgment of death, where the jury are

divided on the issue of punishment. The principle of the mandatory death sentence was abandoned in 1916. P. L., p. 576, c. 270. Following the decision of the old Court of Errors and Appeals in State v. Martin, 92 N. J. L. 436, (E. & A. 1919), the Act was amended to provide the death penalty for murder in the first degree "unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence," recommend life imprisonment, in which case life imprisonment is mandatory. P. L. 1919, p. 303, c. 134; now R. S. 2:138-4. The obvious policy of the statute is action by the jury on an issue of the utmost gravity. The jury are made the final arbiters of the punishment. There is no requirement in specific terms of unanimity on both guilt and punishment before a verdict can be rendered; neither is there a suggestion in the language that a finding of guilt shall entail capital punishment if the jury be not unanimous on the alleviation of the penalty. Under the original act, the jury were vested with an arbitrary discretion; under the amendment, the jury exercise judgment and discretion based on the evidence. State v. Cooper, 2 N. J. 540 (1949). The remission of the death penalty is a function committed to the jury. Their action is made known by the form and content of the verdict—remission by a recommendation of life imprisonment; the contrary by a failure of such recommendation. The choice is the jury's; but a choice there must be, and the action must be unanimous.

The requirement of unanimity in jury verdicts in criminal cases is as ancient as the institution itself; and a construction that would sustain a finding of first-degree murder as a verdict calling for the death sentence, where there was a want of unanimity in the jury as to the punishment, is on the plainest principles insupportable unless that purpose is expressed in clear and unambiguous terms. In the normal course, unanimity is the rule as to all matters within the jury's province. As said by Mr. Justice Reed in a case involving a similar federal statute: "A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." Andres v. United States, 333 U. S. 740, 68 S. Ct. 880, 92 L. Ed. 1055

(1947). There, the Court unanimously rules that the statute required unanimity in the jury both as to guilt and punishment. The common-law attribute of unanimity in the verdict of a jury in criminal cases was reaffirmed and secured by Article I, paragraph 9 of the Constitution of 1947. See American Publishing Co. v. Fisher, 166 U. S. 464, 17 S. Ct. 619, 41 L. Ed. 1079 (1897); State v. Gerry, 68 N. H. 495, 38 A. 272 (1896); also, 24 L. R. A. 272, 43 L. R. A. 78.

Is not the question of punishment, involving, as it does the power of life and death, so intimately identified by the statute with the basic issue of guilt as to constitute an integral part of that issue which must be resolved before a verdict can be returned? Can it be that the Legislature intended that unanimity as to guilt is sufficient to sustain the death sentence, even though all but one of the jurors had concurred in a recommendation of life imprisonment? Surely, under the statute a juror could refuse concurrence in a verdict of guilty, without qualification, if convinced that the death sentence should not be imposed. It would seem to be of the essence of the statutory policy that a juror considering the issue of guilt should not be "influenced consciously or unconsciously by knowledge that the finding of guilt of the crime charged will entail a mandatory penalty which in his opinion is not justified by the degree of moral guilt of the accused. Each juror should now know that the finding of guilt does not carry that mandatory penalty unless the jury fails to make a recommendation of life imprisonment a part of the verdict and each juror should know that he is one of the twelve judges who shall decide what the verdict shall be in all its parts. Until the twelve judges have agreed on every part of the verdict, they have not agreed on any verdict." People v. Hicks, 287 N. Y. 165, 38 N. E. 2d 482, 138 A. L. R. 1222 (1941). The phrase "as a part of its verdict" was deemed significant of this purpose. Judge Lehman continued: "The trial court has read into the statute by implication a proviso that a jury must first agree upon a verdict of guilty, which will have the effect of condemning the accused to death and then may recommend life imprisonment as part of the verdict only if all the jurors agree to recommend life imprisonment.

That is not justified by the language of the statute and would in large measure defeat its plain purpose. Under the construction a jury still must face the choice of condemning the defendant to death or letting him go free unless all twelve jurors thereafter agree upon a recommendation of clemency. That construction ignores the fact that the choice whether a recommendation of life imprisonment should or should not be a part of the verdict is left to the jury and the verdict is incomplete until all have agreed. That construction assumes that the Legislature has confided to a single juror the choice of life or death for an accused." New York's statute is like ours. So is Mississippi's. The Supreme Court there said: "The province of the jury as to their verdict is entire, and they should agree both as to the guilt or innocence of the accused and as to the penalty, if he is guilty." Green v. State, 55 Miss. 454 (1877).

It may be conceded that the legislative language is not so explicit as to be unambiguous; but doubts as to meaning do not linger when consideration is given to the general policy of making the punishment subject to the discretion of the jury rather than the absolute rule of the prior statute which applied the death penalty in every case regardless of palliating circumstances. The new rule embodies the fruits of experience. Miscarriages of justice due to the inexorable decree of the statute were all too frequent. Penal statutes are to be strictly construed against the State; *e converso,* a statute such as this is to be broadly interpreted in favor of the accused. In the Andres case, Mr. Justice Reed said: "In death cases doubts such as those presented here should be resolved in favor of the accused." There should not be a grudging and reluctant concession to the new policy designed to substitute in the matter of punishment the humane impulses and promptings of the jury that heard the evidence and determined the issue of guilt for the unvarying rule of the old law. The wisdom of the policy is peculiarly a legislative province.

Mr. Justice Heher in State v. Grillo, 11 N. J. 173, stated:

The trial judge charged the jury that, if there be no recommendation of life imprisonment, "the penalty

is death, determined not by the jury, but by the statute and pronounced by the court. It is not correct to say that the jury imposes the sentence of death where it does not choose to make the recommendation for life imprisonment."

This suggests that the jury is under no duty affirmatively to determine which of the alternative punishments, death or life imprisonment, shall be inflicted, and thereby unduly modifies the jury's responsibility in this behalf under the rule of R. S. 2:138-4, now superseded by N. J. S. 2A:113-4.

There is laid upon the jury the duty "to determine, within the limits fixed by the statute, what" the accused's "punishment shall be." State v. Rombolo, 89 N. J. L. 565 (E. & A. 1916). The jury are made the final arbiters of the punishment; that tribunal exercises judgment and discretion based on the evidence. The choice is the jury's; but a choice there must be. State v. Cooper, 2 N. J. 540 (1949). I reiterate the views expressed in my dissenting opinion in State v. Bunk, 4 N. J. 461 (1950).

There was fundamental unfairness in this assessment of the jury's statutory function to resolve the issue of punishment, such as in all human likelihood operated to deprive the accused of the essential benefit of the statutory rule. The accused is entitled to a fair trial and to the ungrudging application of the statutory policy for determining the punishment. In the words of Cardozo, C. J.: "A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law." People v. Moran, 246 N. Y. 100, 158 N. E. 35, 37 (Ct. App. 1927). There is all the more reason for fairness where the issue is that of life or death.

In re: State of New Jersey v. Jefferson, 129 N. J. L. 308 (1942), plaintiff was convicted of murder in the first degree under indictment in short statutory form.

The third specification for reversal is directed against the following part of the charge:

"Gentlemen of the jury, from the definitions of the terms in law as applied to acts narrated by the wit-

nesses who took this witness stand in this court, before you during the trial of this indictment of the state against Howard E. Jefferson, the court takes the position that he does not find from all the evidence adduced that the act alleged to have been committed by the prisoner at the bar can be construed to be or characterized as either murder in the second degree or manslaughter. And yet the jury within these legal bounds, as I have already charged might find the defendant guilty of murder in the second degree or even of manslaughter. This court, from all the evidence presented at this trial, feels the verdict warranted on your part, gentlemen of the jury, is guilty or not guilty of murder of the first degree."

The complaint against this is that the discretionary right and duty of the trial judge to comment on evidence was transcended and that all other remarks and instructions to the jury did not cure the error.

We are not unmindful that the right and duty of the trial judge to comment on the evidence has been firmly established and settled for many years.

The exercise of this judicial discretion always calls for great care and the judicial mind should be so expressed as to leave no doubt or uncertainty with the jurors that the ultimate right to settle disputed questions of fact is theirs and this is particularly so where there was evidence if believed and accepted by the jury, that would have warranted a conviction of a lesser degree of crime.

A consideration of this challenged excerpt both separately and with the charge as a whole, forces upon us the definite conviction that *its language carried greater weight* and more binding *importance to the jurors than a mere comment upon evidence and was in substance and effect, a direction to them that the verdict called for was guilty or not guilty of murder in the first degree.*

We conclude that thereby the plaintiff in error suffered manifest wrong and injury and that the judgment should be reversed.

In re: Rudd v. U. S., 173 Fed. Rep. 912, (1909),

> a mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain.
>
> We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment.
>
> The other matters of which complaint is made need not not be considered.
>
> The judgment is reversed, and the cause remanded for a new trial.

In re: Andres v. U. S. (1948), 333 U. S. 740, 68 S. Ct. 880, Mr. Justice Frankfurter concurring, amongst other things, stated;

> The legislature may require the jury to specify the punishment in their verdict. Under such legislation it is necessary for the jury's verdict not only to pronounce guilt but also to prescribe the sentence.
>
> Nine States have statutes more or less like the federal provision here under consideration * * * New Jersey.
>
> The decisions in the highest courts of the several states under similar statutes are not entirely harmonious, but the general current of opinion appears to be in accord with our conclusion. Winston v. United States, *supra,* 172 U. S. at page 313, 19 S. Ct. at page 215. The fair significance to be drawn from State legislation and the practical construction given to it is that it *places into the jury's hands the determination whether the sentence* is to be death or life imprisonment, and, since

> that is the jury's responsibility, it is for them to decide whether death should or should not be the consequence of their finding that the accused is guilty of murder in the first degree. Since the determination of the sentence is thus, in effect, a part of their verdict, there must be accord by the entire jury in reaching the full content of the verdict.

In re: Ochoa v. U. S., 167 Fed. Rep. 2d 341 (1948), it was held,

> the trial court is not permitted to define or limit in any way the jury's exercise of the right to qualify the verdict. The trial court cannot circumscribe the right of the jury in that respect, but must commit the whole matter of its exercise to the judgment and consciences of the jury.

In re: State of New Jersey v. Martin, 92 N. J. L. 436 (1919), plaintiff was convicted of murder in the first degree without recommendation as to punishment, and sought a writ of error to reverse the judgment, amongst other points, arguing that the court's refusal to charge was error. The charge requsted was,

> "If, after considering all the evidence, you find the defendant guilty of murder in the first degree, under your oaths as jurors, you may, at the time of rendering such verdict, recommend imprisonment at hard labor for life." The defendant was entitled to this instruction under the statute of 1916 (Pamph. L., p. 576), which provides that every person convicted of murder in the first degree shall suffer death, "Unless the jury at the time of rendering the verdict in such case shall recommend imprisonment at hard labor for life, in which case this, and no greater punishment shall be imposed."
>
> The trial judge refused upon the ground that he had so instructed the jury, and the defendant complains that the request was not lawfully complied with, because the court in its charge on this point, so instructed the jury as to deprive the defendant of the benefit of his legal right under the statute upon which the re-

quest was rested. As the state urges that the instruction objected to was a mere comment on the evidence, it may be of some assistance in considering the charge, which the court held was a compliance with the specific request refused, to first deal with the legal status of the recommendation the jury are authorized to make. *The statute does not make it a part of the verdict,* for the verdict determines the question of the guilt or innocence of the accused, and that must be arrived at, and be of murder of the first degree, before the question of recommendation arises, which is a distinct matter, for the jury may agree on a verdict that the accused is guilty of murder of the first degree, but not be able to agree to a recommendation. While a jury may be influenced to recommend life imprisonment as a punishment by the very matters which evidenced the guilt of the accused, and perhaps properly so, still in law the jury are not bound to consider such evidence in determining whether to make or refuse a recommendation. That matter is entirely discretionary with the jury and does not require the support of evidence, for it is not a finding of fact, and the trial court is not justified in suggesting to the jury the consideration of the character of the crime, as shown by the evidence produced on the question of the guilt or innocence of the accused, as a reason for withholding the recommendation, and anything which the court may say to the jury with that object in view cannot be excused as a comment on the evidence, for the evidence has no necessary relations to the recommendation which the statute authorizes, but only to the issue presented to the jury by the testimony, and that is the guilt or innocence of the accused.

Returning to the consideration of the question relating to the refusal to instruct the jury as requested, upon the ground that it had been charged, we start with the legal rule observed in this state, that *an erroneous instruction to the jury is not cured, although the court also correctly charged the law, because a jury are not to be allowed to judge which is right between two conflicting statements of the law.* (State v. Clayton, 83 N. J. L. 673), and so if in this case the court, having charged in substance the request, subsequently, by fur-

ther instructions, detracted from the request by charging as the law of the case an incorrect rule, the effect of which was to minimize the application of the legal principle requested, the accused suffered a manifest wrong.

The trial court in instructing the jury first dealt with the question of the guilt or innocence of the accused, and after it had concluded this, then it proceeded to instruct the jury regarding the law of 1916 relating to the recommendation of imprisonment at hard labor for life, and at the outset said that the jury might, if they found the accused guilty of murder in the first degree, recommend imprisonment at hard labor for life, and that the statute fixed no standard or principle to guide a jury in determining in what kind of cases the jury ought to render a verdict of murder of the first degree. "Which will be followed by the death penalty, or the kind of cases in which the jury should render a verdict of the second degree with the recommendation of life imprisonment."

The court then continued its instruction as follows: "Therefore the court cannot as a matter of law instruct the jury that there are certain standards of conduct or principles upon which the jury should act in arriving at a conclusion as to whether or not they will impose the death penalty. In reaching the conclusion as to what the penalty shall be a very grave responsibility is placed upon the jury. It would seem that you ought to consider the condition of the defendant and his interests, and that you ought to consider the condition of the state and the interests of society. It is not a mere question of prejudice upon which one may lightly vote, it seems to the court, but it is the exercise of a high function that may seriously affect the welfare of society. Human life is sacred. If it is treated lightly will that result in a condition of affairs which will bring about murders? Is the punishment of life imprisonment sufficiently severe or must the punishment be death? Does the penalty of death really carry out the purpose that is claimed for it? These and such other matters, as you may deem proper, it seems to the court, are perfectly proper for the

jury to consider in exercising a function of this character. You know that sometimes it is said that penalties are meted out by the law for the purpose of protecting society, as an example to others; sometimes to reform the individual; sometimes to redeem the individual. All these matters, it appears to the court, are left by the statute to your determination and you may, in your discretion, consider them. *If the contention of the state is adopted this is one of the most cold-blooded, atrocious, wicked and depraved murders in the first degree that can be conceived of;* the purpose was to rob the deceased of his rings, stud, pocketbook and money, while the victim lay breathing, apparently his last breath, exclaiming 'Oh, Oh,' the robber and murderer took the rings from his finger, broke the stud from his shirt bosom and relieved him of the contents of his purse; it was apparently done without any motive borne of any instinct even faintly related to any righteous or other provocation."

This was plainly no response to the request to charge, because it instructed the jury that they might, in considering the question of a recommendation to imprisonment for life, consider all the matters which the court recited to the jury, and *the manner of putting it to the jury was such as might influence them to withhold any recommendation,* which was entirely beyond any judicial function which the court possessed. The jury are not required to consider whether punishment of life imprisonment was sufficient to prevent a condition of affairs that would bring about murders, or whether the penalty of death carried out the purposes that is claimed for it, nor was it proper to instruct the jury in this connection that if the contention of the state was adopted, that is, if the jury found the accused guilty as the state contended, then the murder was one of the most cold-blooded, atrocious and wicked in the first degree that could be conceived of.

What inference would any jury draw from this, if, having found the defendant guilty of murder in the first degree they were considering a recommendation to life imprisonment, manifestly its influence on the jury would be that under the matters submitted by the

court, there was no justification for a recommendation, and it undoubtedly would have a tendency to influence a jury to withhold the recommendation.

We think the accused was entitled to have the requested instruction given without the modification of its application indicated by the charge of the court, and that its effect was illegally minimized by the instructions which the court gave to the jury on the very subject matter of the request.

It was clearly an undertaking by the court to influence the discretionary power vested by statute in the jury, and, as was said by Mr. Justice Gray, speaking for the Supreme Court of the United States, construing a similar statute, in Winston v. United States, 172 U. S. 303, 313, "The act does not in itself prescribe, nor authorize a court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and consciences of the jury."

It is unnecessary in this case to further analyze this charge, it is enough to say that the court in dealing with the question of recommendation, told the jury, in substance and effect, that if the jury convicted the accused of the crime charged to him, it was one of the most cold-blooded, atrocious murders of the first degree that could be conceived of, and its only purpose, in the connection it was used, was to influence the jury against a recommendation to imprisonment for life.

This was not a comment on evidence which the court was justified in making, for, as we have said, the court had no power to instruct the jury as to the effect of the evidence upon the question of recommendation, and no one reading this charge can escape the conclusion that the purpose of the trial court was to influence the jury against recommending imprisonment for life because of the enormity of the crime, as he pictured it to the jury.

This he had no legal right to do and the judgment will be reversed.

In re: People v. Hicks, 287 N. Y. 165 (1941),

by providing that a jury "finding a person guilty of murder in the first degree" (in cases of felony murder) "may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life," the Legislature has plainly said that the jury must determine two matters: First, whether the accused is guilty of the crime charged; second, whether the sentence shall be death or whether the trial judge may pronounce a sentence of life imprisonment. *Both questions must be determined by the jury,* and the jury's answer to both questions must be embodied in its verdict. A juror considering the question of whether an accused is guilty of the crime charged can no longer be influenced consciously or unconsciously by knowledge that the finding of guilt of the crime charged will entail a mandatory penalty which in his opinion is not justified by the degree of moral guilt of the accused. Each juror should now know that the finding of guilt does not carry that mandatory penalty unless the jury fails to make a recommendation of life imprisonment a part of the verdict and each juror should know that he is one of the twelve judges who shall decide what the verdict shall be in all its parts. Until the twelve judges have agreed on every part of the verdict they have not agreed on any verdict.

In re: Jones v. State, 161 S. W. 2d 173, S. Ct. of Arkansas (1942),

such instruction and direction as to the form of the verdict was given in the instant case. The charge as to the form of the verdict was as follows: "If, from all the evidence in the case, you find the defendant guilty of murder in the first degree, the form of your verdict should be: 'We, the jury, find the defendant, A. T. Jones, guilty of murder in the first degree, as charged in the indictment, and fix his punishment at death in the electric chair.' Or, if you exercise the option that is conferred by the law on you, you may make the penalty life imprisonment in the State Penitentiary."

> Notwithstanding this specific direction as to the form of verdict to be used in the event the defendant was found guilty of murder in the first degree, the jury did not find the degree of homicide.
>
> If it be said that the imposition of the death penalty shows what was intended, it may be answered that a capital sentence may not be imposed by intendment. The mandatory provision of the statute is that to impose that sentence there must be a finding that the defendant was guilty of murder in the first degree. However technical this may appear, it is nevertheless the requirement of the law. Human life is so tenderly regarded by the law that it may not be taken upon a conviction under an indictment charging the crime of murder unless, by the jury's verdict, the crime was found to be murder in the first degree.

If trial by jury is to be maintained, the right of every accused person to be tried in accordance with the established forms of law must be respected. Where any matter prejudicial to the accused is injected in the proceedings, its harmful character cannot be determined solely by the mere weight of competent evidence unless the court resolves itself into a jury.

POINT E

DeVita suffered manifest wrong or injury in the admission or rejection of evidence, in the charge of the court and in matters touching the conduct of the trial and in common error appearing on the fact of the record.

In the prosecutor's opening to the jury (R. p. 230), he stated,

> "This killing, the state contends, was wilful and deliberate and when these defendants, as the evidence will show, agree and conspire to perpetrate robbery and they arm themselves with guns and one of the de-

fendants fired his gun, killing James Law, they knew and realized what the results would be, and they deserve no consideration at your hands."

This opening was objected to (R. p 231). The indictment charged in statutory form the commission of a homicide. The contention or the theory upon which the prosecutor pursued and was allowed to pursue his opening was based on a homicide and a conspiracy. The accused was not indicted for conspiracy and the issue of conspiracy should not have been presented to the jury. The crime of homicide is referred to in R.S.2A:113-1, and the crime of conspiracy is referred to in R.S.2A:98-1, and are substantive crimes, and these statutes are set forth in the appendix.

In his opening (R. p. 231) the prosecutor was permitted to inform the jury as to his contention of the law. He said,

> "The law pertaining to a killing committed in the perpetration of a robbery provides as follows. So there will be no mistake about it I am going to read it to you. Murder which shall be perpetrated by means of poisoning or lying in wait—you are not concerned with that part of the law—or by any other kind of wilful, deliberate and premeditated killing—and you are not concerned with that part of the law—or which shall be committed in perpetrating or attempting to perpetrate arson, burglary, rape, robbery or sodomy, shall be murder in the first degree. The state contends under the statute, which I have just read you, that when a number of persons are acting together in a plan to commit robbery, a killing perpetrated in furtherance of the crime is deemed within the common purpose and all are alike responsible for it. The state says that each is responsible for everything done by his confederates which reasonably follows in the execution of the plan as one of the natural and probable consequences."

Again, it is reiterated that the jury ought not to be allowed to judge which is right between two conflicting state-

ments of laws and grievous error was committed when (R. p. 232) the court stated to the jury,

> Ordinarily, members of the jury, the court does not allow either the prosecutor or defense counsel to quote law to the jury. The court is permitting it in this case because it concedes it is necessary in order for the state to make explicit what its contention is. The court will allow defendants to make the same explanation. You will realize that the law of the case will be controlled by the court mainly in its charge at the end of the case. You will consider what the prosecutor is now saying as being the condition which the state will project to you.

And the prosecutor was further permitted in his opening to state to the jury (R. p. 232),

> In other words the state says that when several persons conspire and agree to commit the crime of robbery and together set out on the common purpose of robbing a person and murder results, all are equally guilty of murder in the first degree.

The indictment charged a homicide. The prosecutor was proceeding on a theory of a conspiracy to commit the crime of robbery which was at variance to the charge and confusing to the jury.

The trial court further charged (R. pp. 1161-1162),

> So Mr. Foreman and members of the jury, under the facts in this case as they are presented to you, you should bring in one of three verdicts as to each of defendants, Silvio DeVita, Ralph Rosania and Joseph Grillo. They are either (1) guilty of murder in the first degree, or (2) guilty of murder in the first degree with a recommendation of life imprisonment, or (3) not guilty. You will understand, of course, that whichever of the three verdicts you arrive at as to each defendant must be the unanimous verdict of the jury. You will recall that I mentioned previously we are in effect trying three cases in one and that each defendant is entitled separately to your consideration and ver-

dict. Therefore, the form of your verdict should be as follows, it being understood that your verdict as to each defendant, whatever it may be, shall be the unanimous verdict of the jury: We find the defendant Silvio DeVita guilty of murder in the first degree; or we find him guilty of murder in the first degree with a recommendation of life imprisonment, or we find him not guilty as the case may be.

Under New Jersey Rules of Criminal Procedure, 2:7-9, (a), (d), (appendix) the verdict must be unanimous and it must be returned by the jury to the judge in open court and when a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll, there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

The jury returned its verdict (R. p. 1165) and the clerk stated:

Mr. Foreman, how do you find.

The Foreman: We, the jury, find the defendant Silvio DeVita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree.

The Court: The court of its own motion will direct the clerk to poll the jury on the verdicts of defendants Grillo and DeVita.

The clerk polls the jury and the verdict is affirmed.

Referring to a similar verdict as set forth in State of New Jersey v. Merra, 137 A. 578, 579, 103 L. 361, Mr. Justice Kalisch in a dissenting opinion stated:

I cannot concur in the majority opinion of this court, holding that the verdict of the jury did not recommend life imprisonment for both of the defendants. The verdict as originally recorded was as follows:

"We find the defendant Salvatore Merra guilty of murder in the first degree and the defendant Salvatore Rannelli guilty of murder in the first degree, and recommend life imprisonment at hard labor."

By the return to the writ of error the record was certified to by the trial judge as correct. When the case came before this court it was objected to on behalf of the state that the verdict of the jury was erroneously recorded. There is no doubt in my mind that the court in which a verdict is rendered has power in a civil case to mold the same in conformity with the issue tried, where the intention of the jury is clearly expressed and not ambiguous. But this rule is not applicable to verdicts in criminal cases, Chitty on Criminal Law, vol. 1, p. 529, says:

"The jury may also themselves rectify their verdict in the same state of the proceedings, and it will stand as ultimately amended. Though they can neither be directed nor allowed to make any alteration after the verdict is recorded. But a general, like a special verdict may be amended in matter of form, though not in any substantial degree."

And on page 27, this learned expositor of the criminal law says:

"It seems to have been laid down, that in a capital case, a special verdict cannot be amended in matters of fact, yet the court may amend a mere error in form, even in capital cases, when there are any notes or minutes by which it can be amended."

In the present case there were no minutes nor notes by which the amendment could be made. Furthermore, the amendment in the present case was to a matter of fact and not as to the form of the verdict. Surely it cannot be reasonably said that where the amendment of the verdict affects the life or death of the accused that such amendment is only as to the form of the verdict. In the civil cases relied on by the state, at the argument authorizing the amendment of verdicts, it clearly appeared that such amendments were allowed so that the verdicts would be in conformity with the issues tried, but we are dealing here with a capital case.

It appears that after the verdict was rendered the jury was polled and each juror said:

> "I find the defendant Salvatore Merra guilty of murder in the first degree and the defendant Salvatore Rannelli guilty of murder in the first degree and recommend life imprisonment."

Of course, the clerk in recording the verdict was not authorized to put in either periods or commas, and therefore the verdict must be read in its general sense gathered from the language used, and not twisted from its original meaning by punctuation.

Thus we find that the trial judge amends the verdict by putting a period after the sentence, "We find Salvatore Merra guilty of murder in the first degree"; and follows this up by inserting, "We" in the place of "and" which was in the verdict originally rendered, "find Salvatore Rannelli guilty of murder in the first degree and recommend life imprisonment." So by the art of punctuation it is attempted to make it appear now that Salvatore Merra was excluded from the recommendation of life imprisonment.

It does not appear that the trial judge had any notes of what the verdict was, and the only inference is that he must have resorted to occult means in order to recall the intonation of the voice of the foreman of the jury, his hesitation and pauses, in order to portray what took place. To countenance such interference with verdicts of a jury, especially in a case involving life, is a serious inroad on the right of trial by jury. It renders verdicts unstable and leaves a citizen accused of crime at the mercy of judicial oppression. But even with the changes made in the punctuations in the certificate of the trial judge, it still leaves the verdict substantially as originally rendered. It is quite obvious that if the order of the names as appears in the verdict had been reversed, that is, instead of Merra's name being first, it had been last mentioned in the verdict, and if Rannelli's name had been first instead of last mentioned therein, the same argument would obtain; namely, that the recommendation of life imprisonment was intended for Merra, and not for Rannelli. The logical sequence of this situation is that

the order in which the names of the accused appear in the verdict determines the fact as to whom the recommendation of life imprisonment is to be applied. This to me seems to be preposterous. I am unwilling to consign a human being to death on any such hair-splitting refinement.

These defendants were tried on an indictment charging them jointly with murder, and the verdict was a joint verdict, and it is reasonable to believe that if the jury intended to impose a different punishment on Merra than on Rannelli, it would most likely have stated that it found Rannelli guilty of murder in the first degree and recommended life imprisonment and Merra guilty of murder in the first degree. The recommendation of life imprisonment, coming after the statement of finding these defendants guilty of murder in the first degree, carried with it a recommendation of life imprisonment for both. I am unwilling to guess at what the intention of the jury was in delivering the verdict as it did. If it was intended to make a difference in the punishment to be inflicted on the defendants, the verdict, as given, does not express such intention, and if there be a doubt as to what was intended by the verdict, that doubt must be resolved *in favorem vitae*. Therefore my vote is for a reversal of the judgment to the end that the record be remitted to the trial court and that a judgment of life imprisonment be imposed on the plaintiff in error, Merra.

The majority opinion in State of N. J. v. Merra, 137 A. 575, 103 N. J. L. 361, stated,

As rendered, it is divided into two separate sentences by the period which follows the finding as to Merra's guilt. The first of these sentences deals exclusively with that finding. Having declared its conclusion with relation to the charge laid in the indictment against Merra, the jury then proceeded, in a new sentence, to declare its finding with relation to the charge against Rannelli, and, having done so, proceeded in the same sentence to recommend life imprisonment. The period indicates that the jury had finished its pronouncement so far as its verdict related to Merra, and that it then

> declared its conclusion as to its finding upon the charge laid against Rannelli, and as to the punishment which should be inflicted upon him. And that this is not only the grammatical construction of the verdict, but that the verdict was clearly understood as expressing the purpose which that construction indicates is made manifest not only by the conduct of the trial court in pronouncing sentence of death upon Merra, but also by the conduct of the latter's counsel in sitting by and allowing such a sentence to be imposed without protest.

In re: State of N. J. v. Cleveland, 6 N. J. 316 (1951). Cleveland was convicted in the Passaic County Court of murder in the first degree. He appeals claiming error in the manner of the rendition of the verdict, refusal by the court to charge as requested in the admission of a recited confession. The court held,

> The crime was vicious and despicable and the evidence adduced points strongly to guilt. This does not, however, alter the applicable legal doctrines nor nullify or excuse errors committed in the trial. The right of an accused to a fair trial, with the customary safeguards accorded him by the Constitution and our law, is in no degree impaired or diminished by the strength or compelling character of the evidence against him.
>
> "The Clerk: Ladies and gentlemen of the jury, have you agreed upon a verdict?
>
> Jurors: Yes.
>
> The Clerk: Mr. Foreman, how do you find?
>
> The Foreman: We the jury find the defendant, James Cleveland, guilty of murder in the first degree.
>
> Mr. Kushner: I respectfully request on behalf of the defendant that the jury be polled.
>
> The Court: All right, poll the jury.
>
> The Clerk: Hiller Geneslaw, how do you find?
>
> The Foreman: Guilty.
>
> The Clerk: Selvie U. Dulow, how do you find.
>
> Juror No. 2: Guilty.

The Clerk: Lina A. Burke, how do you find?

Juror No. 3: Guilty.

The Clerk: Edward T. Sturm, how do you find?

Juror No. 4: Guilty.

The Clerk: Elwain P. Hitchcock, how do you find?

Juror No. 5: Guilty.

The Clerk: Edward H. Heintjes, how do you find?

Juror No. 6: Guilty.

The Clerk: Ethel F. Baynes, how do you find?

Juror No. 7: Guilty.

The Clerk: Irving Jacobus Grieves, how do you find?

Juror No. 8: Guilty.

The Clerk: Eleanor Horka, how do you find?

Juror No. 9: Guilty.

The Clerk: William H. Brophy, how do you find?

Juror No. 10: Guilty.

The Clerk: Dorothy M. Struyk, how do you find?

Juror No. 11: Guilty.

The Clerk: Thomas Schiffanella, how do you find?

Juror No. 12: Guilty.

The Clerk: Ladies and Gentlemen of the jury, hear your verdict recorded: You say you find the defendant guilty of murder in the first degree, as rendered by your Foreman, and so say you all.

The Court: Ladies and gentlemen of the jury, I thank you for your services in this case. You have done your duty faithfully and well. You are now discharged.

(The jury left the court-room)."

Immediately thereafter the defendant was sentenced to death.

The statute controlling is R.S.2:138-2 (appendix):

"* * * and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree."

Rule 2:7-9 (a) provides the verdict shall be unanimous and shall be returned by the jury to the judge in open court, while section (d) of the same rule reads (appendix):

> "When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If, upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

The polling of the jury is a procedure whereby the jurors are asked individually the finding they have arrived at, as denoted by the questions posed by the clerk: " * * how do you find?" The practice of long standing requires each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict as announced by the foreman.*

If the jury returns a verdict of guilty without designating the degree of murder of which the defendant is guilty, as required by the statute, the verdict is fatally defective and no judgment can be legally pronounced thereon. State v. Turco, 98 N. J. L. 61 (Sup. Ct. 1922).

In State of N. J. v. Cooper, 2 N. J. 540 (1949), discussing the requirements of the statute in this respect, we held:

> "First, the statute is imperative in its command that, if the accused be found guilty, the jury shall determine whether the offense be murder in the first degree or in the second degree; and secondly, we have no way of knowing from the verdict as rendered whether the issue of degree was even considered by the jury, much less determined. The accused is subject to the extreme penalty only in case there shall be a conviction of murder in the first degree in specific terms, unattended by a recommendation of life imprisonment: and the infliction of the death penalty upon a mere verdict of 'guilty' is wholly nugatory."

True, here the foreman of the jury, when first inquired of, said: "We the jury find the defendant, James

Cleveland, guilty of murder in the first degree." Likewise the clerk recited the stated formula after the jury was polled. Admittedly, however, when individual answers were given, each juror, including the foreman, replied 'Guilty' but did not specify the degree of murder which the defendant was guilty of.

The State argues thusly:

"There was no dissent by any member of the jury at any time, nor did the defendant's counsel, even though it was not legally essential, make any objection or protest."

We know of no authority creating an inference because a juryman fails to dissent, nor are we cognizant of any practice which makes his failure to dissent or mere silence the equivalent of a full finding as proclaimed by the statute.

We see little merit in the State's intimation that "it was clear what verdict the jury intended to render and no other inference could be drawn than that the defendant was guilty of murder in the first degree as prescribed by the statute."

In State v. Cooper, *supra*, we determined:

"A finding of circumstances constituting murder of the first degree is not to be annexed to a verdict of 'guilty' by intendment or a presumption based upon the evidence. That is a solemn obligation of the jury in a matter of the utmost gravity: and its fulfillment cannot be made to rest on bare inference. The death sentence cannot be pronounced unless the verdict is definitive of the degree of guilt which entails that penalty. Not only is it understandable that the Legislature deemed it essential that in resolving an issue involving the death penalty or life imprisonment, the finding be specific and not left to conjecture; it is inconceivable that it would not have so provided."

As to the suggestion that relief be withheld because "counsel sat by and allowed the court to impose a sentence of death upon the defendant without the slightest indication of protest," this seems to have been pointedly disposed of in State v. Cooper, *supra*:

> "* * * the failure of the accused, at the time of sentence, to question the sufficiency of the verdict, by motion in arrest of judgment or otherwise, did not serve to confer upon the judge jurisdiction to impose the extreme penalty as for murder in the first degree."

In Williams v. State, 60 Md. 402 (Ct. of App. 1883), there appeared the same factual situation. The jury, by their foreman, declared the defendant guilty of murder in the first degree. Before the verdict was recorded, a poll of the jury was demanded and each juror responded "Guilty" without specifying the degree of murder. On conclusion of the poll, the clerk of the court called upon them to hearken to the verdict as the court had recorded it, saying: "Your foreman saith that Jason Williams, the prisoner at the bar, is guilty of murder in the first degree, and so say you all." The sufficiency of this finding was the sole issue on appeal, which resulted in a reversal of the judgment of conviction and the awarding of a new trial. The Court of Appeals said:

> The prisoner was entitled, as a matter of right, to a poll of the jury, and he could not be convicted, except upon the concurrence of each juror. Upon the poll, it was the duty of each juror to say for himself, whether he found the prisoner guilty of murder in the first or second degree. We all know that jurors sometimes, upon the poll, dissent from the verdict declared for them by their foreman, and it is for the purposes of compelling *each juror to declare his own verdict, in his own language*, that a poll of the panel is allowed. Upon the poll in this case, there was not a single juror who, in finding the prisoner guilty, ascertained the degree of murder as required by the Code. On the contrary, the verdict was "guilty," and such a verdict is, as we have said, on an indictment for murder, a nullity.

A similar development occurred in Commonwealth v. Schmous, 162 Pa. St. 326, 29 A. 644 (Sup. Ct. 1894). The request to poll the jury, however, was not made until after the verdict had been recorded, the individual jurors had declared they found the defendant "guilty" without specifying the degree of murder, but the court upheld the verdict, saying:

> "According to the well-settled practice in the Oyer and Terminer, the request to poll the jury came too late, and should have been denied. The verdict, in due form, had already been not only announced, but recorded, and affirmatively responded to by the entire jury."

The question involves more than a technical violation of a statute or rule of procedure. It is a matter "of utmost gravity" as it adjudicates not alone the guilt of the defendant but carries with it the punishment of death. Such a determination cannot be left to inference. The finding must be specific and in exact accord with the statutory mandate.

We think the law clearly demands that when a jury in a murder case is polled, each juror, if he finds the defendant guilty, shall designate by his verdict whether it be murder in the first degree or in the second degree.

This was not done in the case under consideration and we think it constituted prejudicial and therefore reversible error.

In re: State of New Jersey v. Cooper, 2 N. J. 540 (1949), six defendants were sentenced to death upon a verdict of guilty rendered by a jury. The case was tried on the theory of a homicide committed in the perpetration or attempted perpetration of a robbery. The court held:

The judge did not have jurisdiction to pronounce the sentence of death.

The verdict was "guilty" merely; and thus none of the accused was convicted of murder in the first degree. The return to the writ of error certifies that the accused were "found guilty in manner and form as they stand charged under the indictment and are guilty of murder in the first degree;" and that on the poll each juror affirmed his concurrence in that verdict. But, by an order made by the judge in the Mercer County Court on January 13, 1949, the return was amended to accord with the fact as entered in the clerk's minutes, and so the verdict of the jury as to each of the accused is shown to be "guilty", without more.

One cannot be put to death for homicide unless there has been a verdict by a jury, after trial of the issue in the constitutional mode, establishing in a specific terms his guilt of murder in the first degree. This is a peremptory statutory direction. It is provided that murder perpetrated "by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate arson, burglary, rape, robbery or sodomy, shall be murder in the first degree; and all other kinds of murder shall be murder in the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree." R. S. 2:138-2. And it is further provided that every person "convicted of murder in the first degree," his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall "by its verdict, and as a part thereof, upon and after the consideration of all the evidence," recommend life imprisonment, in which event no greater punishment shall be imposed. R. S. 2:138-4. The accused may not plead guilty to an indictment for murder: a plea of *non vult* or *nolo contendere* is permissible, but the death sentence cannot be imposed on that plea. R. S. 2:138-3.

The State suggests that the provision for the designation of the degree of murder of which the accused has been found guilty is applicable only to "murder perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing," since murder committed in the perpetration or attempted perpetration of one of the enumerated felonies is murder of the first degree, even though the elements of deliberation and premeditation are wanting. But this would constitute a disregard of the plain letter and the indubitable reason and spirit of the statute. *The power to exact the extreme penalty was not to be left to doubtful inference.* The sentence of death could be pronounced only upon the return of a verdict of guilty of murder

of the first degree in certain and definite terms, unaccompanied by a recommendation of life imprisonment.

The indictment does not charge murder in the commission of a robbery. It does not specify the manner in which or the means by which the death of the victim was accomplished. In accordance with the statutory formula (R. S. 2:188-11), it charged murder without regard to degree or circumstance; and this sufficed. The offense of murder remained as it was at common law before the statute: the distinction of degree has reference to a difference in punishment. The most heinous are punishable by death or life imprisonment, as the jury shall determine; those wanting in the same degree of moral perversion, by punishment less severe. But it is of the very essence of the statutory procedure that the jury adjudge the degree of guilt and thereby the character of the punishment. Graves v. State, 45 N. J. L. 347, (E. & A. 1883). A killing which constitutes murder at common law or under the statute is presumed to be murder in the second degree; and the burden is laid upon the State to establish circumstances which would render it murder of the first degree under the statutory provision cited *supra*. Brown v. State, 62 N. J. L. 666, 669 (E. & A. 1899); State v. Leo, 80 N. J. L. 21 (Sup. Ct. 1910).

It is not a sufficient answer to say that the theory of the State was a killing in the perpetration or attempted perpetration of a robbery by the accused; and that this was the issue submitted to the jury for determination, and the alternative to acquittal under the charge was a conviction of murder in the first degree. First, the statute is imperative in its command that, if the accused be found guilty, *the jury shall determine whether the offense be murder in the first degree or in the second degree;* and secondly, we have no way of knowing from the verdict as rendered whether the issue of degree was even considered by the jury, much less determined. The accused is subject to the extreme penalty only in case there shall be a conviction of murder in the first degree in specific terms, unattended by a recommendation of life imprisonment; and the infliction of the death penalty upon a mere verdict of

"guilty" is wholly nugatory. It goes without saying that a verdict of "guilty" upon an indictment which simply charges "murder without regard to the degree" is not a verdict of guilty of murder in the first degree. A finding of *circumstances constituting murder of the first degree is not to be annexed to a verdict of "guilty" by intendment or a presumption based upon the evidence. That is a solemn obligation of the jury in a matter of the utmost gravity; and its fulfillment cannot be made to rest on bare inference.* The death sentence cannot be pronounced unless the verdict is definitive of the degree of guilt which entails that penalty. Not only is it understandable that the Legislature deemed it essential that in resolving an issue involving the death penalty or life imprisonment, *the finding be specific and not left to conjecture; it is inconceivable that it would not have so provided.* This was the holding in the case of State v. Turco, 98 N. J. L. 61 (Sup. Ct. 1922). There also, the evidence tended to show a killing in the commission of a robbery; and there, also, the jury were instructed that under the law the accused was either guilty of murder in the first degree or of no offense at all. There, too, the indictment was in the statutory form; and the conclusion was that the death sentence cannot be pronounced unless there is a specific finding by the jury of murder in the first degree. While that was not an adjudication of the court of last resort, it has ever since stood unchallenged; and the failure of the Legislature to exercise its amendatory power is significant of acquiescence in that interpretation. We consider that that case was soundly reasoned and decided. It is not a differentiating circumstance that the death sentence here was pronounced in the presence of the jury, immediately after the rendition of the verdict and before dispersal. The jury's silence did not constitute an amendment of the verdict, nor confer jurisdiction to pronounce the judgment of death.

And it is a corrollary of the foregoing considerations that the *failure of the accused, at the time of sentence, to question the sufficiency of the verdict, by motion in arrest of judgment or otherwise, did not serve to con-*

fer upon the judge jurisdiction to impose the extreme penalty as for murder in the first degree. Compare State v. O'Leary, 110 N. J. L. 36 (E. & A. 1933).

The charge relating to the jury's function to determine the punishment upon a finding of murder in the first degree is assigned for error.

The jury were advised that if the killing was done in the perpetration or attempted perpetration of a robbery of the deceased Horner, as the result of a common purpose, the punishment would be death unless the jury "shall by its verdict and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment." And then came this instruction:

> "There are no restrictions or limitations placed on the jury by law as to the reasons which may prompt such a recommendation. Ask yourselves then the question: 'Are such defendant or defendants found to be guilty, if you so find, entitled to receive mercy at your hands or should they for any reasons of your own receive the extreme penalty of death?' What you are asked to do, and are bound by your duty to do, is to keep in mind your responsibility not only to do justice to the defendants, but also to remember your similar responsibility to the State in the Administration of its criminal laws and the maintenance of law and order and in the detection and punishment of crime. You are charged with the most solemn duty that the law can impose upon you as citizens."

Thus, the jury were told that they were under "no restrictions or limitations * * * as to the reasons" for a recommendation of life imprisonment. The inquiry for the jury was stated to be whether the defendants, if found guilty, were "entitled to receive mercy at your hands, or should * * * for any reasons of your own receive the extreme penalty of death?" In this, there was error.

The exercise of this statutory power to substitute life imprisonment for the death *penalty is not governed by*

a specific standard; but it is requisite that action rest upon some consideration arising out of the evidence. State v. Deegan, 132 N. J. L. 261 (E. & A. 1944); State v. Giampietro, 107 N. J. L. 120 (E. & A. 1930). *So confined, the jury's discretion is absolute and uncontrolled.* The exercise of the function is not restrained by any other rule. The statute makes no pretense of delineating the circumstances which in legislative contemplation would serve to mitigate the rigor of the death penalty. That question is committed to the judgment and conscience of the jury, guided by the evidence.

Under the original act of 1916 (P. L., p. 576, c. 270), the jury were at liberty but not bound to consider the evidence in determining whether to make or to refuse a recommendation of life imprisonment. It was a discretionary function whose exercise did not require "the support of evidence," for it was not "a finding of fact," and the trial judge was not justified "in suggesting to the jury the consideration of the character of the crime, as shown by the evidence produced on the question of the guilt or innocence of the accused, as a reason for withholding the recommendation;" and what was said by the judge to the jury to that end could not be "excused as a comment on the evidence," for the evidence had relation only to the issue of guilt or innocence and not to the recommendation permissible under the statute. State v. Martin, 92 N. J. L. 436 (E. & A. 1919). Chancellor Walker, in his dissent, expressed the view that, while a recommendation of life imprisonment was not a part of the verdict, and it was not the *province of the judge "to influence the jury in making such a recommendation," that "discretion may properly be arrived at only by a consideration of the evidence."* Then came the amendment of 1919 (P. L. p. 303, c. 134: now R. S. 2:138-4), which provides the death penalty for murder in the first degree unless the jury shall "by their verdict, and as a part thereof, upon and after consideration of all the evidence," recommend life imprisonment. Unlike the pre-existing provision, the recommendation is made a constituent element of the verdict. Under the orig-

inal statute, the jury were vested with an arbitrary discretion; under the amendment the jury exercise judgment and discretion based upon the evidence. As Mr. Justice Lloyd said in State v. Giampietro, *supra: "Trial judges should be on guard against the introduction of other elements that might influence the making or withholding such recommendation."*

Here the instruction might well have resulted in the use of considerations dehors the evidence as grounds for withholding the recommendation. We have no way of knowing that it did not have such influence. It is not difficult to conceive of extraneous factors that would have such effect when the consideration of the jury is not confined to the evidence. The prior reference to the specific terms of the statute touching the jury's consideration of the evidence on this inquiry provides no assurance that the jury understood the precise nature and scope of its function in this regard, for the instructions are contradictory, and the jury did not have the faculty of divining the true principle. State v. Martin, *supra;* State v. Clayton, 83 N. J. L. 673 (E. & A. 1912). * * *

The verdict of a jury should be so certain as to leave no room for mistake, vagueness, obscurity or inescapable doubt. A finding of guilt by a jury has no legal consequence unless it is embodied in a verdict. The verdict as to both guilt and punishment is indivisible. A capital sentence ought not to be imposed by intendment. Human life is so tenderly regarded by the law that it may not be taken upon a conviction under indictment charging the crime of murder, unless by the jury's verdict the crime was found to be murder in the first degree. The law's tender solicitude must rise above the verdict. The verdict must be so explicit that nothing written or said is required to supplement the meaning or add dignity to the judicial process. To send one to eternity, the finding must be in language clear and comprehensive.

Under the New Jersey Rules, 1:2-19(a), in criminal causes, errors appearing on the face of the judgment record are reviewable.

The trial court had charged the jury that under the facts of the case they were directed to bring in three separate verdicts (R. pp. 1161-1162), and that "they were trying three cases in one and that each defendant is entitled to your consideration and verdict". The finding by the jury was not in accord to the charge nor to the theory upon which the case was submitted, nor to the law, R. S. 2A:113-4, and the verdict of the jury is uncertain, doubtful and void. The recommendation of life imprisonment by such verdict can be annexed to the finding of guilty of murder in the first degree as to defendant, Silvio DeVita, as well as to defendant Ralph Rosania. The finding is one finding and not three separate findings. It parallels and is similar to the finding of the jurors in the cases hereinbefore cited. The jury were bound under the charge and the law to return separate verdicts and not a joint verdict, and the verdict must be certain in legal intendment.

The verdict as recorded in the transcript and in the additional record which is submitted with the petition for this writ is similarly defective and void. It is the duty of each juror upon being polled to state the verdict to the court and the clerk of the court legally cannot invade this function and province of the jury. The answer of each juror in the affirmative is not deemed a verdict of each juror under the cases and law cited. The pronouncement of the sentence of death upon such a verdict is error. Upon the verdict, the sentence is unwarranted, and without due process.

CONCLUSION.

It is, therefor, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated: April 15, 1953.

HARRY KAY,
Attorney for Petitioner,
Silvio DeVita.

APPENDIX.

Constitution of New Jersey, 1947, Article I

ARTICLE I

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

10. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

ARTICLE VI, *Section II*

3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

Revised Statutes

2:216-9. Keepers of places of detention in certain municipalities detain prisoners for hearing. In all cities, towns and townships where there is a prison, lockup, police station or place of detention for the reception and detention of prisoners awaiting examination, trial or final commitment at the hands of the proper authority or authorities of the municipality, the person having charge of such prison, lockup, police station, or place of detention shall receive, on the proper and legal commitment of a justice of the peace of the county in which the prison is situate, any prisoner, and detain him for hearing on the order and commitment of the justice for examination, commitment to the county jail or for trial before the justice, for any period not exceeding forty-eight hours.

2A:85-7. Misdemeanors, punishment. Any person found guilty of a crime which by any statute is declared to have been a misdemeanor and for which no punishment is specifically provided, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than three years, or both.

2A:98-1, 2. Conspiracy. Any 2 or more persons who conspire:

A. To commit a crime; or

B. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested; or

C. Falsely to institute and maintain any suit; or

D. To cheat and defraud a person of any property by any means which are in themselves criminal; or

E. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or

F. To obtain money by false pretenses; or

G. To conceal or spread any contagious disease; or

H. To commit any act for the perversion or obstruction of justice or the due administration of the laws—Are guilty of a conspiracy and each shall be punished as for a misdemeanor.

Overt act necessary; exceptions. Except for conspiracy to commit arson, breaking and entering or entering, burglary, kidnapping, manslaughter, murder, rape, robbery or sodomy, no person shall be convicted and punished for conspiracy unless some act be done to effect the object thereof by 1 or more of the parties thereto.

2A:113-1. Murder. If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this state, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, coroner, constable or other officer of justice, either civil or criminal, of this state, or a marshal or other officer of justice, either

civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a private person interposes, then such person so killing is guilty of murder.

2A:113-2. Degrees of murder; designation in verdict. Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree.

2A:113-3. Murder; plea of guilty not to be received; plea of *non vult* or *nolo contendere* and sentence thereon. In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.

Nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

Nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

2A:113-4. Murder; punishment. Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed. Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.

2A:141-1. Robbery; penalty. Any person who forcibly takes from the person of another, money or personal goods and chattels, of any value whatever, by violence or putting him in fear, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both.

2A:151-62 Laws of 1952, p. 25, ch. 5.

1. Any person who shall sell, give, loan, furnish or deliver, any knife which has a blade which opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife, the blade of which, when open, projects from the handle, or a person who shall purchase, have, or possess any such knife, shall be guilty of a misdemeanor.

Table of Rules of New Jersey Court cited.

1:2-19(a). In *criminal causes, errors apparent on the face of the judgment record shall be reviewable as heretofore.* Error in the admission or rejection of testimony, or in the charge of the court, or in the refusal to charge as requested by the defendant, or in the denial by the court of any matter resting in discretion, or in any other ruling or order made during the course of the trial, shall be cause for reversal if specific objection thereto was made and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury. The court may, however, notice plain errors affecting substantial rights of the defendant, although they were not brought to the attention of the trial court. If it shall appear, after challenge interposed by the defendant in the appellate court, that the verdict was against the weight of the evidence, the judgment shall be reversed and a new trial ordered. A verdict of a jury shall not be set aside as against the weight of the evidence unless it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion.

2:3-3 (a), (b), (c). Proceedings Before Magistrate.

(a) Appearance. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an ar-

rest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate. A complaint shall be filed forthwith and a warrant issued thereon.

(b) *Statement by the Magistrate.* The magistrate shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. If the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waivers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket.

(c) *Preliminary Examination.* If the defendant does not waive indictment and trial by jury but does waive preliminary examination, the magistrate shall forthwith bind him over to await final determination of the cause. If the defendant does not waive examination the magistrate shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him. If, from the evidence, it appears to the magistrate that there is probable cause to believe that an offense has been committed and the defendant has committed it, the magistrate shall forthwith bind him over to await final determination of the cause, otherwise, the magistrate shall discharge him. The magistrate shall admit the defendant to bail as provided by these rules. After concluding the proceeding the magistrate shall transmit, forthwith, to the prosecuting attorney all papers in the cause whether the defendant be held or dismissed and any bail taken by him shall be transmitted to the county clerk.

2:5-1. Arraignment. Arraignment shall be conducted in open court and shall consist of reading the indictment or accusation to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or accusation before he is called upon to plead.

2:5-2 (a), (b). Pleas.

(a) A defendant may plead not guilty, guilty, *non vult* or *nolo contendere*, excepting, however, that no defendant

can plead guilty to murder save as provided by law. The court may refuse to accept a plea of guilty, *non vult* or *nolo contendere*, and shall not accept such plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty the court shall enter a plea of not guilty.

(b) If a defendant, upon arraignment, shall stand mute, the court shall direct that a plea of not guilty be entered for him.

2:7-9 (a), (d). Verdict.

(a) *Return.* The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(d) *Poll of the jury.* When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If, upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

2:12-7. Exceptions in Criminal Cases.

Exceptions to rulings or orders of the court or instructions to the jury are not required in order to reserve the questions involved for review on appeal; and for all purposes for which an exception has heretofore been necessary it suffices that the defendant, at the time the ruling or order of the court is made, or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection shall not thereafter prejudice him.

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No. 733

Supreme Court of the United States

JOSEPH GRILLO,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

JOSEPH GRILLO,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To: The Honorable Fred M. Vinson, Chief Justice of the United States and the Associated Justice of the Supreme Court of the United States.

Your petitioner, Joseph Grillo, respectfully shows:

Summary Statement of the Matter Involved.

Petitioner, and one Silvio DeVito, were convicted of murder in the first degree in the Essex County Court. They were sentenced to die by electrocution. An appeal was then taken from the Essex County Court to the New Jersey Supreme Court, the court of last resort, which Court entered a judgment affirming the judgment of the Essex County Court, and petitioner has been re-sentenced to die by electrocution.

The opinion in the Court below is reported in 11 N. J. 173.

The issue presented to this Court is whether or not the petitioner was denied due process of law in connection with his arrest, indictment and conviction of a charge of murder in the courts of the State of New Jersey. The denial of due process is involved in the manner of the extraction of a confession from your petitioner by physical and moral compulsion and the detention of the petitioner for a long period of time without arraignment during which period said confession was forced from him and also the actions of the trial court and the prosecutor during the trial of the case.

This Court Has Jurisdiction.

The Federal Constitutional issues are properly preserved. This case presents an important question as to the rights of petitioner under the 14th Amendment of the United States Constitution. A confession was extracted from petitioner and used in evidence at a trial whereby he was convicted of murder in the first degree and sentenced to death by electrocution. The circumstances under which the confession was extracted and the actions of the trial court and the prosecutor during the trial show a fundamental unfairness which amounted to a complete denial of due process.

Trial was had and the conviction of petitioner was appealed to the New Jersey Supreme Court, the court of last resort of the State of New Jersey.

At the trial proper objection was taken to the introduction of the oral admissions and a written statement of petitioner as well as to the admission of the statements

of the co-defendant, Silvio DeVito. The trial Judge permitted all of said admissions and confessions to go into evidence. On the appeal to the New Jersey Supreme Court error was charged by counsel for each of the defendants with respect to the said action of the trial judge in admitting said confessions and admissions into evidence. This error and numerous other errors of the trial court as grounds of appeal were argued at length in the printed briefs submitted to the New Jersey Supreme Court and they were argued extensively in the oral argument before the New Jersey Supreme Court.

This court therefore has jurisdiction by virtue of 28 U. S. C. 1257 because of the errors committed by the trial court and further, because the New Jersey Supreme Court sustained the trial court and in so doing refused to follow the decisions of the United States Supreme Court involving such rights of persons charged with murder.

The Question Presented.

The question presented to this court is:

Whether or not the manner of arrest and detention of the petitioner and the coercive manner of extracting statements and a written confession from petitioner and the actions of the trial court and the prosecutor throughout the trial of the case were violative of the constitutional rights of the petitioner under the 14th Amendment of the Constitution of the United States so as to deny petitioner due process of law.

Statement of the Case.

The State contended at the trial that about one month prior to November 9, 1951 a plan to rob the Universal Market in Newark originated. In accordance with the said plan on November 9, 1951 Joseph Grillo, Silvio DeVito, both of whom were armed, and Ralph Rosanio, took a position opposite the Universal Market on Broad Street, Newark, New Jersey, and there waited for the manager of the market to make up the deposit of the days receipts of the market for the purpose of taking them to the bank. When the manager came out of the market with the deposit in the company of James Law, a Special Police Officer, and got into the car of James Law, by which means the manager was to be driven to the bank, Grillo and DeVito approached the car from opposite sides and while attempting to seize the deposit monies Grillo's gun went off, James Law was shot and subsequently died as the result of the bullet wound. After the gun went off Grillo seized the money and he and DeVito fled the scene.

Several days later, in an effort to avoid arrest, Joseph Grillo jumped from the second floor of his home into the back yard, as the result of this he fractured his leg and was seized by the police. He was taken to Police Headquarters and some hours later to a hospital where the fracture was treated and his leg put in a cast. After the cast was put on his leg he was taken back to police headquarters where he was questioned almost continuously for three days and nights concerning the subject matter of this case and other matters. While in the custody of the police he was denied the right of communicating with his family;

he was not permitted to get proper sleep; he did not get proper medication for the pain he was suffering; he was not given proper food and he was not permitted to have the advice of counsel. It was only after a continuation of this treatment over a period of days that he made the oral admissions which were subsequently reduced to writing and placed in his signed confession.

Reasons for Allowance of a Writ.

Joseph Grillo and Silvio DeVito were tried together in the Essex County Court. A petition for a writ of certiorari to the New Jersey Supreme Court has been filed in the case of Silvio DeVito, Petitioner, vs. The State of New Jersey, Respondent, and in connection therewith there has been filed a transcript of the record of the trial and proceedings in the Essex County Court of both Grillo and DeVito. The question here involved is identical with the question involved in the DeVito case. Therefore in view of the fact that the reasons for the issuance of a writ, the record of proceedings and the legal argument in connection with the same are all identical with the DeVito case, and in view of the fact that this petitioner is indigent, this petitioner respectfully requests this Honorable Court to permit him to adopt the record, the reasons and legal argument set forth in the petition for writ of certiorari and the brief in support thereof filed by Silvio DeVito, and make them his reasons and argument for the writ as if the same were set forth herein at length.

Conclusion.

For the foregoing reasons your petitioner respectfully submits that there are involved important questions of constitutional law and that these questions should be reviewed by this court and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 732

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

SILVIO DEVITA,

Petitioner,

v.

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF FOR THE STATE OF NEW JERSEY OPPOSING PETITION FOR WRIT OF CERTIORARI.

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The Supreme Court of New Jersey fairly and fully passed upon this question, and it did not decide any Federal constitutional question of substance contrary to the decisions of this Court 32

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The Supreme Court of New Jersey fairly and fully passed upon these questions, and it did not decide any Federal constitutional question of substance contrary to the decisions of this Court 35

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The Supreme Court of New Jersey fairly and fully passed upon these questions, and it did not decide any Federal constitutional question of substance contrary to the decisions of this Court 42

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Wharton's Crim., Ev. (11th Ed.), Vol. 1, Sec. 300, p. 397 33

Warren on Homicide, Vol. 4, Sec. 327, p. 99 45

22 *C. J. S.*, Sec. 636, p. 974 33

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

SILVIO DEVITA,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF OPPOSING PETITION FOR CERTIORARI.

I.

Reference to official report of opinion delivered in the Court below.(*)

The opinion of the Supreme Court of New Jersey, the court immediately below, which affirmed the judgment of conviction in the County Court of Essex County, New Jersey, is officially reported at 11 N. J. 173 (Advance New Jersey Reports under date of February 16th, 1953, *sub nomine State* v. *Grillo;* 93 A. (2) 328).

(*) Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief refer to pages on the printed record submitted by petitioner.

II.

Counter-Statement Concerning Jurisdiction.

Counsel for petitioner states (DeVita's Petition, p. 3), that the jurisdiction of this Court is invoked under Title 28 U. S. C. A. 1257 (3).

We respectfully submit that the decision of the Supreme Court of New Jersey in this case, involving the questions presented in the petition, is in conformity with the provisions of the United States constitution respecting due process of law and equal protection of the laws as guaranteed therein,[1] and in conformity with the provisions of the constitution of the State of New Jersey of 1947[2], and that the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Court below.

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[1] Constitution of the United States, Amendment XIV, Section 1.

[2] The constitution of New Jersey, 1947, Art. I, Sec. 1, provides:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Article I, Sec. 10, of the New Jersey constitution provides:

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

III.

Counter-Statement of the Case.

Petitioner herein, Silvio DeVita, and Joseph Grillo, together with Ralph Rosania, were tried and convicted on March 8th, 1952 of murder in the first degree in the Essex County Court, New Jersey.

The jury returned a verdict of first degree murder against all three, but it recommended life imprisonment for Rosania only, and on March 12th, 1952 DeVita and Grillo were sentenced to death.

DeVita and Grillo appealed from the judgment of their conviction to the Supreme Court of New Jersey, and the latter Court, on December 15th, 1952, affirmed (11 N. J. 173; 93 A. 2d 328).

Silvio DeVita now petitions this Honorable Court for a writ of certiorari to review the determination of the Supreme Court of New Jersey.

This brief is also submitted in opposition to Petition of Joseph Grillo for writ of certiorari.

IV.

Statement of the Facts.

The crime was the killing of one James Law, committed during the perpetration of robbery, which, under the law of New Jersey, constitutes murder in the first degree.[3]

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[3] The pertinent statute at the time of the crime was N. J. S. A. 1937, Title 2:138-2 providing:

> "Murder * * * which shall be committed in perpetrating or attempting to perpetrate * * * robbery * * * shall be murder in the first degree; * * *."

The deceased was a special officer employed by the Universal Food Market at 595 Broad Street, Newark; and one of his duties was to escort and guard the manager of the food market, named Thomas Lofrano, in taking the store receipts to the bank for deposit.

The Universal Food Market is a large chain grocery store located on the westerly side of Broad Street, a short distance south of Central Avenue. It has a frontage of about 57 feet with two entrances on Broad Street, and it carries the usual line of foods, meats, fruits and vegetables in five separate departments.

The market had its accounts in the National State bank, at 763 Broad Street, about six city blocks south of the store.

On the night of the crime, November 9th, 1951, shortly before 8:00 P. M., the store-manager Lofrano, as was his custom, collected the receipts consisting of cash and checks from the various departments in the market; he arranged the cash and checks in bundles with wrappers, slips, etc., and he placed the entire lot in a canvas bag furnished for such purpose by the bank and locked it. He then placed the canvas bag in an ordinary brown manila paper bag for camouflage purposes.

The receipts consisted of $5,161.21 in cash and $476.60 in checks (R. 496).

With the bag under his left arm, Lofrano walked through the entrance to the sidewalk, followed by the deceased, James Law, who was dressed in a special officer's uniform and with his gun drawn.

On the sidewalk there were large crowds of shoppers, and there was considerable traffic of cars and buses on the street.

Law had a car, a dark-colored 1947 Dodge sedan, which he customarily used in transporting Lofrano to and from

the bank. He had double-parked his car in Broad Street in front of the market, facing south in the direction of the bank.

Lofrano and Law proceeded to the car. Law opened the door on the right side, and Lofrano entered the front seat, placing the money bag on the seat to his left. Law then went around the car and sat down behind the wheel, with the money bag between him and Lofrano.

As Law was about to start the motor, the door on Lofrano's side was opened from the outside, and a man (later proved to be petitioner DeVita) stood close to the car and said in a low voice, "It's a stick-up!" DeVita had a gun pointed across Lofrano's stomach and Lofrano "froze" (R. 327, 328).

At about the same instant, the car door on the left, the driver's, side was opened from outside by the co-defendant, Joseph Grillo. Grillo pointed a gun at Law, and as Law raised his hands from the wheel, Grillo fired a shot at Law, wounding him, and Grillo reached into the car and stole the money bag (R. 329-330).

Both Grillo and DeVita made their escape on foot immediately after the shooting. Grillo ran across Broad Street with the money bag under his arm. He lost his hat in the street. He arrived on the easterly curb; he turned and returned to the middle of the street to retrieve his hat. Then he ran with hat in hand in an easterly direction and disappeared. DeVita, on the right side of the car, also ran from the scene in a northerly direction on Broad Street and turned westerly on Central Avenue and disappeared.

Law was removed to a hospital where he died about 2 hours later without regaining consciousness. The cause of death was given as internal hemorrhage and shock.

Later the same evening, two persons (Vito Giunta and Lucille Siano), while going to their parked car on Central

Avenue after seeing a movie, found a .32 caliber automatic gun. They turned the gun over to the police, and it was later proven that it was the gun used by DeVita in the robbery.

The crime was not immediately solved, but an intensive investigation was begun by the Newark police and the Essex County Prosecutor's Office, in an effort to solve not only the murder of Law but various other armed robberies of a similar nature which had been committed in Essex County over a period of several months and which had remained unsolved.

Early November 13th (4 days after the crime), Newark police went to Grillo's home at No. 14 Cutler Street, Newark. Grillo was not at home and the officers waited in their car parked across the street. Soon Grillo appeared and started toward his home. As one of the officers called to him, Grillo ran into the hallway of his home and upstairs with the officers in pursuit. In attempting to avoid arrest, Grillo ran onto a porch of one of the upper floors and jumped into the yard of the premises next door. He was overtaken and brought to Newark police headquarters for questioning. Shortly thereafter he was taken to a hospital for treatment of a leg injury sustained in his attempted escape. At about 1:00 P. M. he was returned to headquarters for questioning.

At about 1:00 P. M., the same day, petitioner DeVita was taken into custody by members of the Newark Bandit Squad and taken to Newark police headquarters for questioning. (The Bandit Squad is assigned to the investigation not of homicides, but of crimes such as robberies, burglaries and the like.)

The following day, November 14th, at about 3:35 P. M., the third defendant Ralph Rosania (who was sentenced to

life imprisonment), was taken into police custody and likewise taken to Newark police headquarters for questioning.

In police headquarters, all three men were subjected to intermittent questioning by the police in connection with the series of armed robberies which had occurred in the City of Newark and Essex County.

The original questioning was not in connection with the Law murder.

The solution of the Law murder came about in the following manner.

On November 14th, as the result of information received by the police from a nineteen-year old youth named Nicholas Sola, a god-brother of Grillo's, the police took Sola on a tour of the First Ward of Newark. Sola showed the police various sewers in which he had thrown bullets, masks and a shoulder-holster, taken by him after the Law killing from a public locker in the railroad station of the D. L. & W. Railroad at Broad Street, Newark, at the request of Grillo and DeVita (R. 501; 540).

Sola testified for the State that on November 12th (3 days after the Law killing) he was given a key by Grillo and DeVita to a locker in the Lackawanna Railroad Station (Locker No. 270), and they instructed him to empty out its contents with instructions to "keep the gun home and throw the other stuff away" (R. 501); and that he followed their instructions by keeping the gun, destroying the brief case, and throwing the bullets, masks and holster in different sewers in the First Ward.

The sewers were drained by the police and most, if not all, of the articles were recovered and admitted in evidence at the trial.

Police questioning of the three men in custody (Grillo, DeVita and Rosania), with respect to the Law murder,

began after the disclosures made to the police by the Sola boy and after the recovery of the articles from the sewers.

The first one to admit participation in the crime was Rosania. Late in the afternoon of the 15th, Rosania admitted orally to Sergeant Kinney of the Newark Homicide Squad that he had "fingered the Universal job on the 9th for Silvio and Grillo" (R. 543). Rosania admitted to Sergeant Kinney that he had previously been employed at the Universal Market at various times prior to the crime and that several weeks before the killing he told Grillo and DeVita that the place "would be easy to take." The last time he had worked at the market was about a week before, on November 2nd (R. 546, 547).

Upon the basis of information given by Rosania, Sergeant Kinney questioned Grillo and DeVita on the evening of the 15th, and each then admitted his participation in the murder of Law.

As the result of information given by Grillo and DeVita, and while Grillo was being questioned on the evening of the 15th, three detectives (Norris, Schoenick and Nisivoccia) made a search of the cellar at Grillo's home, and among the rafters in the ceiling they retrieved two bags containing $1,900 (R. 582, 583). The money and bags were brought to headquarters and placed on a table before Grillo during his questioning.

Immediately following the oral admissions of all three to the police, on the night of the 15th, at about 11:00 P. M., a formal criminal complaint for murder was sworn to and filed against them.

At the same time, written statements were taken from all three at police headquarters, which consumed several hours until past midnight.

Upon completion of the written statements, all three were brought together in one room where the statement

of each was read aloud in the presence of all. Thereafter, each read his own statement aloud in the presence of the others, except Rosania, who, after reading a portion of his statement, stated he could not read very well and his statement was then read aloud by an Assistant Prosecutor (Webb).

At the trial, the State proved the voluntariness of both oral and written statements of all three, in accordance with the requirements of New Jersey law, which we shall hereinafter discuss.

The three defendants were arraigned on the criminal complaint on the morning of the 16th in the First Criminal Court.

Grillo's written statement was admitted in evidence as Exhibits S-56 and S-56A (R. 777); DeVita's as Exhibit S-69 (R. 692); and Rosania's as Exhibit S-68 (R. 767).

As to the events that took place prior to, during, and immediately following the commission of the crime, we refer to the facts contained in the written statements of Grillo and DeVita, Exhibits S-56 & 56A, and S-68 respectively.

Grillo, DeVita and Rosania, were friends and associates who, together with others frequently visited the Colonial Diner, an eating place on Broadway, in the northerly section of Newark, about two miles from the Universal Market.

Rosania had formerly been employed at the market as a salesman at the vegetable counter in the front part of the store.

He had observed the procedure of having the store receipts taken to the bank by Lofrano under the protection of the special officer, James Law, the deceased.

Some time prior to the crime, Grillo had purchased several guns. In June, 1951, he bought a .32 automatic

and several cartridges for $30 from a man he knew as "Charcoal"; the same month he, DeVita, and one Angelo Barbarisi stole a .38 revolver from the glove compartment of a parked car; and in August, 1951, he bought an Italian Beretta automatic gun for $25 from a man he knew as "Jerry Pips", and he bought cartridges for these guns.

Grillo admitted he kept the guns and cartridges in a stolen brief case; that he stored the articles in a public locker in Lackawanna Railroad Station on Broad Street, Newark; and that he kept the key to the locker.

DeVita admitted being present when Grillo bought the .32 automatic, and that he and Grillo had access to the station locker.

At the trial, the State produced the persons who had sold the guns to Grillo.

Both DeVita and Grillo admitted in their statements that during the week prior to the crime Rosania had told them at the Colonial Diner that "the place had a lot of money and could be easily knocked off," and that "on Friday nights they take the money to the bank * * * and that it would be easy to take."

In their statements, DeVita and Grillo were in substantial agreement as to the occurrences immediately before and during the actual robbery and killing.

They met at a pool room at about 5:00 P. M. and they "talked about how we were going to pull the stickup." They separated and again met at about 6:30 P. M. They called Rosania and informed him that they were prepared to commit the robbery that night, and Rosania joined them.

The three walked together to the Lackawanna R. R. Station to get the guns. On the street nearby, Grillo handed the locker key to DeVita and Rosania and told them to bring down the brief case. When they brought the brief case, Grillo opened it and took out the Beretta

automatic and put it in his coat pocket. DeVita took out the .32 automatic and put it in his pocket. The brief case was returned to the locker.

Grillo said he knew "both guns were loaded • • • I knew they were loaded before." DeVita said he "knew his automatic was loaded with some bullets."

The three men then continued to walk down Broad Street to the vicinity of the Universal Market. They crossed to the other side of the street and sat on a bench in Military Park facing the market. It was then shortly after 7:00 P. M.

There they discussed the proposed robbery. Rosania pointed out the manager, Lofrano, to his companions. He described the car that would take the deceased and Lofrano to the bank. Rosania left for a few minutes to go to a nearby parking lot to look for the car. Rosania returned, saying he could not see the car. After about 20 minutes Rosania left his companions, saying he did not want to be recognized by any of the store employees; and he left for the Colonial Diner, saying he would see the other two later.

DeVita and Grillo then agreed that Grillo would take the driver's and DeVita the passenger's side of the car.

DeVita left the bench, crossed Broad Street, and took a position alongside the market.

Soon they appeared, Lofrano holding a "package" in his hand, followed by the uniformed special officer Law, and they walked toward the car.

DeVita and Grillo immediately closed in on the car, Grillo coming from across the street and DeVita approaching from the near side. They both got to the car almost simultaneously, as Law and Lofrano were seated and Law was about to start the motor.

This is DeVita's version of what occurred at the time:

> "By this time I was at the car and I opened the door nearest the sidewalk. I went to take my gun out of my belt on the left side and I heard a shot that came from the other side of the car. I shut the door and ran toward Central Ave. and ran to the middle of the block and took my gun from my belt and threw it into an ash can which was near the curb."

Grillo's version was that he walked across the street to the car and the following occurred:

> " • • • I opened the door with my right hand, and I took my gun, the Beretta, with my left hand, out of my pocket, pointed the gun at the guard, and said, 'This is a stickup, don't move,' I am holding the gun on the guard, at about the height of his shoulders, and the gun is about a foot and a half away from the guard's body. While holding the gun in my left hand, I pull the slide of the gun back with my right hand. I know this cocks the gun and puts a cartridge in the firing chamber. I did this to make the manager and the guard scared. When I pulled the slide of the gun back with my right hand the gun went off. I did not have my finger on the trigger of the gun. I had my hand on the handle of the gun and did not have my finger through the trigger guard and on the trigger, at the time the gun went off. When the gun went off, I heard the guard say 'I'm shot, I'm shot;' and I knew that when my gun went off the shot must have hit the guard. When the gun went off, I got scared, and I reached in, grabbed the brown paper bag that was on the front seat between the guard and the manager, put the gun back in my pocket and ran across Broad Street towards the park."

After the shooting, Grillo ran across Broad Street with the money bag under his right arm; he lost his hat in the middle of the street, and after going a few steps he turned and went back to retrieve his hat. Then, with the money bag under his right arm and his hat in his left hand he ran across Broad Street, and he made his way through various streets until he returned to the Lackawanna R. R. Station. There he stored the money bag in his locker, keeping the murder gun in his pocket. He then took a taxi to the Colonial Diner. Upon arriving at the diner, Rosania was about to leave in a car to pick up DeVita, and Grillo joined him.

DeVita, after the shooting, ran to Central Avenue where he turned left, and in the middle of the block he threw his gun into an ash can. After walking several blocks he telephoned the Colonial Diner, talked with Rosania, and asked to be picked up.

Soon Grillo and Rosania arrived in a friend's car, and after picking up DeVita, they all returned to the diner.

At the diner, Grillo borrowed a car and he drove to the Passaic River where he threw his gun, the Beretta, into the river.

Later, DeVita and Grillo went to their respective homes and changed clothes. Then they went to the locker in the railroad station and took out the stolen money bag. Thereafter they drove to New York City and registered in a hotel under assumed names. In their hotel room they opened the money bag and counted the stolen money. Each took out $500 in cash and put the bag with the rest of the money in the trunk of their car. They went to a night spot in New York City and spent the rest of the night in their hotel room.

The following afternoon they returned to Newark, and in the evening, in the cellar of Grillo's home, they

burned the stolen checks, they placed the cash in paper bags and hid the balance of the loot "on some boards on the ceiling." Later that night they again went to New York City where they spent some time at the same night-spot, and later they both took women to hotels under assumed names.

After their arrest, on November 17, both Grillo and DeVita were taken by the police to the Passaic River to point out where Grillo had thrown his gun. The police retrieved the gun on the afternoon of November 17 by grappling and with the aid of a magnet. The gun was admitted in evidence at the trial.

The fatal bullet which killed the deceased, after passing through the body of Law, was found on the seat of the car. At the trial it was proven to have been fired from the Beretta automatic used by Grillo, and it was admitted in evidence.

Both DeVita and Grillo took the witness stand in their own behalf.

They admitted that they kept their guns, bullets and masks in the locker in the Lackawanna Railroad Station, and that they kept them in a brief case, prepared to use them whenever they were to stage a robbery. Grillo stated that he "put dimes" in the locker every 24 hours, which he did himself or sent others there including DeVita for the purpose. Grillo said he could not remember how many times he went to the locker; and DeVita admitted he went there "maybe ten times," and that he had seen the brief case "about 12 or 13 times."

Both DeVita and Grillo admitted that on the night of the crime they started out together for the express purpose of committing robbery of the Universal Market. DeVita said he carried his gun "Because we were going to rob," and

Grillo stated, "We went there for money," although he had no intention of doing any killing.

As to the occurrences immediately prior to, during, and following the killing, both DeVita and Grillo gave substantially the same story on the witness stand that they gave the police in their written statements. Grillo's contention was that the shooting was unintentional and accidental.

As far as the evidence in the case is concerned, there was ample evidence to sustain the State's contention that the crime was a killing in the perpetration of robbery, which, under New Jersey law, is murder in the first degree, which, without a jury recommendation of life imprisonment, calls for the death penalty.

It is to be noted that in the appeal before the Supreme Court of New Jersey, it was not claimed by DeVita or Grillo that the verdict was against the weight of the evidence.

V.

Summary of the Argument.

We respectfully submit:

First: There was no violation of due process either in connection with the taking of the confessions or time of the arraignment.

a. The confessions were voluntary as construed by the law of New Jersey.

b. The Supreme Court of New Jersey properly approved of the trial court's action in receiving the confessions in evidence, and it did not decide any Federal

Constitutional question of substance in a manner contrary to the decisions of this Court.

SECOND: At the trial, the State did not offer any proof of any unrelated crimes other than the crime of homicide for which the petitioner and his co-defendants were being tried, i.e., the killing of deceased during the perpetration of robbery.

a. Any evidence submitted by the State concerning the activities of petitioner and his co-defendants after the commission of the homicide was relevant and admissible on the main issue of guilt or innocence, and on the question of the disposition of the fruits of the crime.

b. The Supreme Court of New Jersey properly passed upon this question and it did not decide any Federal Constitutional question of substance in a manner contrary to the decisions of this Court.

THIRD: The prosecutor's statements to the jury in his opening and summation, were justified under the facts and circumstances of the case; they were not prejudicial and they were not violative of due process.

a. The Supreme Court of New Jersey properly passed upon this question and it did not decide any Federal Constitutional question of substance in a manner contrary to the decisions of this Court.

FOURTH: The trial court's refusal to charge a request that intent is an essential element of the crime of robbery; and its charge on the subject of recommendation of life imprisonment was not prejudicial or violative of due process.

a. The Supreme Court of New Jersey fairly and fully passed upon these questions and it did not decide any Federal Constitutional question of substance in a manner contrary to the decisions of this Court.

FIFTH: The prosecutor's statements to the jury in his opening with respect to the State's theory of the case; the Court's charge on the kind of verdict the jury could return; the jury's verdict as returned; were all in conformity with the law of New Jersey, and were not violative of due process.

VI.

The Argument.

POINT ONE.

Petitioner's confession was given voluntarily, and it was received in evidence in accordance with the law of New Jersey.

The Supreme Court of New Jersey, in sustaining the Trial Court's action in receiving the confession in evidence, decided the question in accordance with the established law of the State, and it did not decide any Federal constitutional question of substance in any manner contrary to the decisions of this Court.

Petitioner makes the same contention in this Court that was advanced in the Supreme Court of New Jersey, wherein it was claimed that, although there was concededly no use of "physical force" in the procurement of the confessions, the defendants were subjected to a "mental ordeal" caused by alleged continuous questioning by the police, coupled

with a failure to allow the petitioner proper rest and sleep, a denial of proper food and opportunity of communicating with family and counsel during the questioning, and an alleged unreasonable delay of arraignment before a magistrate.

Following is a brief statement of the proofs at the trial.

Grillo was the first to be arrested, early the morning of November 13 (4 days after the murder). The arrest was made by members of the Newark Bandit Squad, which usually handles cases of non-homicide robberies, stickups, burglaries, and the like.

DeVita, this petitioner, was arrested on the afternoon of the same day, November 13; and Rosania, the "finger" man, was taken into custody the following day, the 14th.

All three arrests were made by the Bandit Squad, and the prisoners were taken to Newark police headquarters for questioning.

It is to be noted, and it was so proven at the trial, that the arrests were not made in connection with the Law murder, but that these men were taken into custody, together with others, as suspects in a series of recent robberies and stickups committed in the general Newark area which were unsolved and wherein the pattern used by the perpetrators was similar to the crime at the Universal Market.

The questioning of the three men was undertaken by members of the Bandit Squad from the time of their arrest on November 13 and 14; and the questioning was done intermittently, down to the disclosures made to the police on November 14 by the 19-year old youth, Nicholas Sola, that he had disposed of, at the request of Grillo and DeVita, a gun, bullets, masks and a shoulder-holster and briefcase in sewers of the First Ward.

It was after the police received this information from Sola, and Sola was taken by the police on the 14th on a tour

of the First Ward to point out the particular sewers, and the articles were retrieved by the police, that the case was turned over to the Homicide Squad and the questioning of Grillo and DeVita in connection with the Law murder was begun.

The first time Grillo and DeVita were questioned about the Law murder was late in the afternoon of November 15.

Rosania was the first to reveal his participation in the Law murder. On the afternoon of the 15th, he told a member of the Bandit Squad (Detective Scurese) of the extent of his participation in the crime. Sergeant Kinney of the Homicide Squad was called in and Rosania repeated his story to him, stating he "had fingered the Universal job on the 9th for Silvio (meaning this petitioner DeVita) and Grillo" (R. 543), and he related the details in which he implicated Grillo and DeVita.

Sergeant Kinney then questioned DeVita with respect to Rosania's story; Rosania was brought in to confront DeVita and Rosania repeated his story in DeVita's presence. It was then that DeVita admitted participation in the Law murder.

Sergeant Kinney testified that the entire interview, including the questioning of DeVita and the confrontation by Rosania consumed "About two hours" (R. 551). And he testified that no force was used, or threats of violence made, or hope of reward held out to DeVita (R. 550).

Grillo was the last of the three to be questioned on the Law murder on the evening of the 15th. Sergeant Kinney told him of the disclosures of DeVita and Rosania. During his interview by Sergeant Kinney two detectives (Norris and Schoenick) went to Grillo's home and retrieved a portion of the stolen money from the cellar, and the money was brought to headquarters and placed on the

table before Grillo. Grillo admitted his participation in the Law murder.

A formal complaint for murder was filed against all three at about 11.00 P.M. of the 15th in the First Criminal Court.

Thereafter, beginning late on the night of the 15th and continuing past midnight, written confessions were taken from all three.

The written confession of this petitioner DeVita was taken by Prosecutor's Detective Meagher and Detective Coppola; Grillo's was taken by Sergeant Kinney and Lieutenant McMahon; and Rosania's by Detectives Norris and Scurese. The three statements were taken in separate rooms on the 4th floor of Newark police headquarters.

Upon completion of the written statements, the three were brought into a large room where the statement of each was first read aloud by the officer who took it, in the presence of the others; and Grillo and DeVita read their statements aloud in the presence of the other defendants.

After the reading and re-reading aloud of each statement, they were signed by the accused and their signatures witnessed.

They were individually questioned by an impartial citizen-witness, Mr. Charles T. Schaedel, as to the police treatment in connection with the taking of their statements. The citizen-witness went in and out of the rooms while the statements were being taken, and he questioned each one of the accused as to police treatment. This was his testimony at the trial, (R. 648):

> "Q. Tell us what you asked them. A. I asked each one separately if they had enough to eat, enough sleep, enough cigarettes, and they all replied that they did. I also asked each one separately if they had any complaint to make at all, if they had been

mistreated or maltreated, or if they had any complaints, and they all said individually and separately that they had none."

There was ample evidence in the case to establish that the confessions were given voluntarily under the accepted rule in New Jersey and they were properly admitted in evidence. There was no extortion by force or threats of violence, and there was no direct or implied promise or hope of reward by anyone in authority. (*State* v. *Cole,* 136 N. J. L. 606, E. & A. 1947, cert. den. 334 U. S. 851, 92 L. Ed. 1773, 68 S. Ct. 1503; *Roesel* v. *State,* 62 N. J. L. 216, 225, E. & A. 1898; *State* v. *Genese,* 102 N. J. L. 134, 139, E. & A. 1925).

On the question of the alleged denial of due process of law, it is the respondent's contention that the facts and circumstances of the instant case do not present a situation where it can be said that the confessions were procured by "moral compulsion," or that there was a "fundamental unfairness" constituting a denial of due process of law guaranteed by our Federal Constitution.

There is no basis in fact for petitioner's statement hat DeVita had been "continuously interrogated for 64 hours," and that there was "long hours of uninterrupted grilling, mental duress, constant pressure," (Petitioner's Brief, p. 66, Point A). There was no such evidence at the trial.

Petitioner DeVita, in his own behalf, testified at the trial that, "I don't think I was questioned about it (the Law murder) on the 13th," (the day of his arrest), (R. 676); that on the 14th he was questioned by various members of the Bandit Squad about *"other robberies"* to which he gave inculpatory statements; and that during the first two days of his detention, the 13th and 14th, he was questioned altogether "five hours at the most—five or six

hours," (R. 676, 677). He admitted that he was first questioned about the Law murder on the morning of the 15th by Sergeant Kinney of the Homicide Squad "About an hour," (R. 678), and that all of the questioning on the 15th about the murder took "About five hours," (R. 678). He admitted that on the night of the 15th he was confronted by Rosania, and he admitted his participation in the murder.

Sergeant Kinney of the Homicide Squad testified for the State that prior to his final interview with DeVita on the night of the 15th, he questioned DeVita on only one occasion on the 14th and his interview took "About two hours," (R. 551). He testified, too, that it never had been the practice in police headquarters to prohibit a prisoner in a murder case from seeing anyone, (R. 565); and that in this case there had been no request by any attorney to see DeVita, (R. 566).

There was the testimony of the impartial citizen-witness, Schaedel, that during and after the taking of the confessions he questioned each of the defendants individually and separately whether they had had enough to eat, and sufficient sleep and cigarettes, and "they all replied that they did;" that he asked each one if he "had any complaint to make at all", concerning police treatment, and "they all said individually and separately that they had none," (R. 648).

We submit that under the facts and circumstances of the instant case there was no "fundamental unfairness" in connection with either the taking of the written statements or alleged delay of arraignment to constitute a denial of due process such as existed in *Watts* v. *Indiana,* 338 U. S. 49, 93 L. Ed. 1801; *Turner* v. *Pennsylvania,* 338 U. S. 62, 93 L. Ed. 1801; and *Harris* v. *South Carolina,* 338 U. S. 68, 93 L. Ed. 1815 (all 1949), cited and quoted at length by petitioner in his Brief.

We submit, too, that under the circumstances of the instant case, the period of interrogation on other crimes prior to the questioning on the murder case cannot be taken into account in the over-all period of interrogation as a factor in the determination of voluntariness and on the claim of want of due process of law in connection with the Law murder.

The United States Supreme Court has recently dealt with two cases in which defendants confessed to murder while in custody and while being questioned at length about other crimes: *U. S.* v. *Carignan,* 342 U. S. 36 (Nov. 13, 1951), 72 S. Ct. 97; and *Gallegos* v. *State of Nebraska,* 342 U. S. 55, 72 S. Ct. 141.

In the *Carignan* case, defendant had been arrested for an assault with intent to rape, perpetrated six weeks after a murder. He was taken into custody about 11:00 A. M. on September 16. While he was in custody, he was questioned by the police about the murder. A witness who had seen the man involved in the murder and his victim together at the scene of the crime, was brought to the police station during this time, and from a lineup he picked out defendant as one appearing to be the person that he saw on that occasion. Defendant refused to give any information about his activities on the day of the murder.

The following day, a Saturday, defendant was questioned again, and although defendant said he would give a statement he did not do so. On Sunday, he was not questioned, but on Monday the questioning was resumed. After some time, defendant gave a written statement in which he did not admit the murder. The questioning was again renewed and finally defendant gave a written statement, which was later placed in evidence, in which he did admit the killing.

It was argued by the defendant among other things, that the confession was not admissible because the confession was obtained "by secret interrogation and psychological pressure by police officers". In answering the last challenge, this Court said:

> "So long as no coercive methods by threats or inducement to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given." • • •
>
> "One cannot say that this record justifies characterization of this confession as given during unlawful detention. Rule 5, Federal Rules of Criminal Procedure, does not apply in terms, because Carignan was neither arrested for nor charged with the murder when the confession to that crime was made. He had been arrested and committed for the assault perpetrated six weeks after the murder. His detention, therefore, was legal. Further, before the confession, there was basis for no more than a strong suspicion that Carignan was the murderer. That suspicion arose from a doubtful identification by a person who had in passing seen a man resembling the respondent at the scene of the murder and from a similarity of circumstances between the murder and the assault. *The police could hardly be expected to make a murder charge on such uncertainties without further inquiry and investigation.*" • • • (Italics ours.)
>
> "Complete protection is afforded the civil rights of an accused who makes an involuntary confession or statement when such confession must be excluded by the judge or disregarded by the jury upon proof that it is not voluntary. Such a just and merciful rule preserves the rights of accused and society alike. It does not sacrifice justice to sentimentality. *An extension of a mechanical rule based on the time of a confession would not be a helpful addition to the*

rules of criminal evidence. We decline to extend the McNabb fixed rule of exclusion to statements to police or wardens concerning other crimes while prisoners are legally in detention on criminal charges." (Italics ours.)

In the *Gallegos* case, the defendant was an illiterate Mexican who spoke no English. According to the dissenting opinion the facts were: "While working in a field in El Paso County, Texas, on September 19, 1949, the petitioner was arrested by a local deputy sheriff without a warrant. The excuse given for the arrest was that immigration officers had requested it. No charge was ever filed against petitioner in any Texas state court nor was any warrant sworn out against him during the eight days he was kept in the Texas jail. His detention was incommunicado except for repeated questioning by the deputies. Part of the time petitioner was kept in an 8′ x 8′ cell with no windows, a cell which a Texas deputy testifying in this case referred to as the 'dark room' or the 'punishment room', although petitioner was a 'docile prisoner' and did all he was told to do by the officers. It was during this eight days of incarceration that the petitioner gave a confession used to convict him in this case."

For three days, Gallegos refused even to tell his name. The immigration authorities did not suspect that defendant had murdered the woman with whom he had lived, but the officials apparently had some information that the woman had disappeared. Defendant finally admitted not only his name and his illegal status in this country, but he went on and admitted the murder which he had committed in Nebraska. The authorities in Texas notified the State of Nebraska, and defendant was removed to Nebraska on September 29th. He was questioned in Nebraska on Octo-

ber 1st and again confessed. On October 13th, he was arraigned on a complaint charging murder and, as the Court points out, "this was the first time petitioner was brought before any magistrate or court."

At the trial, both the Texas and the Nebraska confessions were admitted in evidence over objection. On appeal, it was argued that defendant's incarceration was continuous from the date of his arrest to the date of his trial; that the Texas confession was forced by his incarceration, the action of the deputies, and the terror of this illiterate alien, unfamiliar with our ways, without friends and without counsel; and that the incarceration and interrogation from the date of the arrest in Texas to the date of the second confession in Nebraska must be considered as one continuous whole. The court however said, as it had in the *Carignan* case, that lack of counsel prior to the confession was made while in the custody of the police does not render it inadmissible. The Court said that prolonged detention without a charge of crime or without preliminary appearance before a magistrate, the lack of counsel before, during or after arraignment, and confession to the police in private, are only elements that should be considered in determining whether a confession has been obtained under such circumstances that its use violates due process, but none of these facts standing alone or even together are conclusive. The Court said:

> "So far as due process affects admissions before trial of the defendant, the accepted test is their voluntariness. This requires appraisal of the facts of each particular case open to consideration by this Court. In recent cases, where undisputed facts existed far more likely to produce involuntary confessions than those in this case, there was disagreement as to whether due process was violated. The

facts here to support a claim of denial of due process are not so convincing.'" • • •

"We have carefully weighed the circumstances of the petitioner's lack of education and familiarity with our law, his experience and condition in life, his need for advice of counsel as to the law of homicide and the probable effect on such a man of interrogation during confinement. We have also taken into consideration Gallegos' uncontradicted testimony about his accommodations, his limited amounts of food and certain threats made by a Texas assistant sheriff not present at the trial. The uncertain character of this uncontradicted testimony, its lack of definiteness, and the action of the trial judge and jury lead us to place little weight upon it. Our position is confirmed by Gallegos' reiteration of his confession while in custody in Nebraska, when he charges no coercion except detention. See *Lyons* v. *State of Oklahoma*, 322 U. S. 596, 603, 64 S. Ct. 1208, 1212, 88 L. Ed. 1481.

"We cannot say that Nebraska has here violated standards of decency or justice in this conviction."

In their concurring opinion, Mr. Justice Jackson and Mr. Justice Frankfurter said:

"Texas made the arrest at the request of the immigration authorities and it is not denied that they had probable cause to believe he was an alien who had entered the country illegally. But, for three days he would not tell his name. I should not suppose the authorities were obliged to release an obvious alien so charged before they could learn his identity. Then he disclosed the murder. But the murder did not take place in Texas. That State obviously could not arraign him for it. Was it obliged to turn loose a confessed murderer because the murder occurred outside of their jurisdiction? It does not seem to me that to hold such a person without arraignment under these circumstances

> denies due process, unless due process prohibits society from taking common-sense steps to solve a murder.
>
> "But it is complained that Nebraska held him too long (just how long is too long we never are told) without arraignment. As I have pointed out, Nebraska knew nothing of the murder and had to conduct an investigation before it could make a properly supported charge of murder. Certainly due process does not require that charges be placed hurriedly and recklessly."

We submit that the New Jersey Supreme Court properly concluded that the procurement of the confessions and their admission in evidence did not violate due process, as follows, 11 N. J., p. 181:

> "We find no error in the allegations of denial of due process, leveled at the confessions of the defendants and their introduction in evidence in this case was proper. The record shows marked spontaneity of attitude of the defendants to disclose the information in the confessions, as expressions of free choice and not the product of physical or mental ordeal or compulsion. There was no fundamental unfairness in the use of the evidence."

On the question of alleged delay of arraignment, neither the petitioner DeVita nor Grillo raised this question before the New Jersey Supreme Court.

The record, however, shows that Rosania first admitted his participation in the crime in the late afternoon of November 15, and after all three had made oral admissions of participation, a formal complaint was lodged against them on the night of the 15th, at about 11.00 P. M. The taking of the written statements commenced on the night of the 15th and continued past midnight; and all three defendants were formally arraigned before the magistrate

in the First Criminal Court on the morning of November 16, less than 24 hours after their admission of the crime of murder.

Rule 2:3-3(a) of the New Jersey Rules of Criminal Practice provides:

> "An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unreasonable delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate. A complaint shall be filed forthwith and a warrant issued thereon."

We submit that in the instant case there was no "unreasonable delay" of arraignment as to constitute a violation of the above rule.

Furthermore, it has been established in New Jersey that a violation of the above rule, in and of itself and standing alone, will not vitiate a confession otherwise voluntarily given, and will not impair a conviction which is otherwise valid. (*State* v. *Pierce,* 4 N. J. 252, 263, 1950; *State* v. *Schmieder,* 5 N. J. 40, 45, 1950.)

On the question of petitioner's claim that he was denied the right "to contact members of his family, counsel or anyone" (B. p. 66), the New Jersey Supreme Court also passed upon the question and affirmed the rule established in our State that an accused has the constitutional right to the aid and assistance of counsel in his defense and not to save him from his own voluntary acts, citing and quoting from *State* v. *Murphy,* 87 N. J. L. 515, 528-531 (E. & A. 1915) and *State* v. *Bunk,* 4 N. J. 461, 470 (S. C. 1950), certiorari denied 340 U. S. 839, 71 S. Ct. 25, 95 L. Ed. 615 (1950).

In his Brief (pp. 69-127), petitioner cites and quotes at length from numerous cases involving due process in con-

nection with the taking of confessions used at the trial. We have read and considered them, and while we do not quarrel with the legal principles therein, it cannot be said that the facts and circumstances in those cases holding that there was a violation of due process can be compared with those in the instant case. Cases such as *People* v. *Mummiani,* 258 N. Y. 394; *White* v. *Texas,* 310 U. S. 530, 60 S. Ct. 1032; *State* v. *Cooper,* 2 N. J. 540, (N. J. S. C. 1949); *Bute* v. *Illinois,* 333 U. S. 640, 92 L. Ed. 986; *McNabb* v. *U. S.,* 318 U. S. 332, 87 L. Ed. 819; *Ward* v. *Texas,* 316 U. S. 547, 62 S. Ct. 1139; *Carter* v. *Illinois,* 329 U. S. 173, 67 S. Ct. 216; *Turner* v. *Pennsylvania, supra; Chambers* v. *Florida,* 309 U. S. 227, 60 S. Ct. 472; *Malinski* v. *New York,* 324 U. S. 401, 65 S. Ct. 781; *Harris* v. *South Carolina, supra; Watts* v. *Indiana, supra; Vernon* v. *State,* 196 So. 96, (Sup. Ct. Alabama); *Betts* v. *Brady,* 316 U. S. 455, 62 S. Ct. 1252; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 64 S. Ct. 921; *Garner* v. *U. S.,* 174 F. (2) 499; *Upshaw* v. *U. S.,* 335 U. S. 410, 69 S. Ct. 170; and *Akowskey* v. *U. S.,* 158 F. (2) 649 are distinguishable from the case at bar as to facts and circumstances and are not applicable.

We have heretofore discussed the cases of *United States* v. *Carignan,* 342 U. S. 36, 72 S. Ct. 97 and *Gallegos* v. *Nebraska,* 342 U. S. 55, 72 S. Ct. 141, cited and quoted from by petitioner in his Brief, and we consider that the principle therein is most favorable to the respondent. Likewise, *Stroble* v. *California,* 343 U. S. 181, 72 S. Ct. 599, cited and quoted from by petitioner, supports the respondent's contention.

In the instant case, Grillo was arrested early the morning of November 13; DeVita was arrested on the afternoon of the same day; and Rosania on the following day, the 14th.

From the time of their arrest down to the time they made oral admissions of the murder in the late afternoon of the 15th, there was intermittent questioning by members of the Bandit Squad in connection with various other robberies and stickups requiring considerable investigation of those crimes, the holding of lineups, examination of witnesses, and taking of written statements.

Grillo corroborated the police as to the hospital care given him for his injured leg sustained in his attempted escape just before his capture. The testimony of Grillo and DeVita as to the sufficiency of food and lack of rest and sleep was vague and conflicting. There was the testimony of witnesses that there was no incessant questioning, and both Grillo and DeVita testified that there were no abuses as physical force, threats or promises of reward.

The police questioning in connection with the killing of Law commenced on the afternoon of the 15th and continued until after the completion of the written statements after midnight.

The formal complaint was made on the night of the 15th, and the defendants were arraigned before the magistrate the following morning, the 16th. There was no hearing or preliminary examination on the complaint and none was requested, and the three defendants were immediately remanded to the county jail to await the action of the grand jury.

We respectfully submit that there is no substance to the claim that there was any denial of due process of law guaranteed by the Fourteenth Amendment as it has been defined by this Court.

POINT TWO.

Evidence submitted by the State concerning the activities of De Vita and Grillo immediately following the robbery and killing was relevant and competent on the main issue of their guilt or innocence of the crime and the manner of their disposition of the spoils.

The Supreme Court of New Jersey fairly and fully passed upon this question, and it did not decide any Federal constitutional question of substance contrary to the decisions of this Court.

The defendants DeVita and Grillo admitted in their written statements that after the crime they went to New York City in a car (borrowed by DeVita from his uncle); that they brought the bag with the stolen money with them; and that they arrived in New York at about 9:30 P. M. They immediately hired a room in a hotel under fictitious names; they brought the money bag to their room; they opened it with the aid of a screwdriver; and they counted out the money, which DeVita admitted amounted to $5,150. They each took $500 in cash, placing the bag with the remainder of the money in the trunk of their car, and they proceeded to the Moroccan Village, a night spot. There they met up with two entertainers, named June Hazan, known as "Smokey," and Wyona Stauffer, known as "Mickey." Both women were produced by the State at the trial. June Hazan testified that Grillo had given her $20 as a gift, (R. 825); and the Stauffer girl testified that she went to a hotel room with DeVita after closing hour of the night spot. She testified that in the hotel room she saw "a quantity of money on the dresser," and that the following morning DeVita gave her a gift of $100 (R. 832).

We submit that under these facts and circumstances the evidence was relevant and competent on the main issue of guilt or innocence of the crime of murder committed in the perpetration of robbery, and particularly on the question of the disposition made by the defendants of the fruits of the crime.

It is elementary that the prosecution may properly show what the robbers had done with the stolen money, the fruits of the crime.

Wharton's Crim. Ev. (11th Ed.), Vol. 1, Sec. 300, p. 397, says:

> "Subsequent circumstances * * * or the possession of the money * * * or other property by the accused, similar to that possessed by the deceased, or the flight of the accused from the place of crime or from the vicinity, are relevant for the prosecution to show, where they are connected with or explain the details of the crime."

And in *22 C. J. S.*, Sec. 636, p. 974:

> "* * * It is also relevant to show that accused or an accomplice had money or other property in his possession which was the fruit of the crime, or related thereto."

Petitioner, in his Brief (pp. 128-130), relies upon cases which we do not consider to be applicable, (*State* v. *DePaola,* 5 N. J. 1, N. J. S. C. 1950; *State* v. *Schmieder,* 5 N. J. 40, N. J. S. C. 1950; and *People* v. *Nuzzo,* 294 N. Y. 227, Ct. App. 1945).

In the *DePaola* case, *supra,* the defendant, a tavern owner, was tried and convicted of murder committed in 1948. One of the grounds for reversal was the improper cross-examination of defendant by a series of questions

intended to show that prior to the crime, yearly from 1941 to 1948, defendant had made written application for liquor licenses under oath and had given false answers on whether he had ever been convicted of crime; and in ruling the questions improper the New Jersey Supreme Court affirmed the rule that, while previous convictions of crime may properly be shown to affect credibility, acts of misconduct not resulting in criminal conviction and unrelated in point of time and fact to the crime being tried, may not be shown.

In the *Schmieder* case, *supra,* wherein judgment of conviction of murder in the first degree was affirmed, the established rule was again affirmed, that evidence of other crimes unconnected and unrelated in any way to the crime then being tried is irrelevant and incompetent.

In the *Nuzzo* case, *supra,* the defendant, an agent of a labor union, was tried for grand larceny of union funds, and the State showed that he had taken various trips to conventions in different cities in the company of a lady whose expenses were paid by defendant. Such evidence was held to be unrelated to the crime charged, and that such conduct tended to prove bad character, falling short of the rule that previous criminal convictions may be shown to affect credibility.

That is not the situation here. In the instant case the evidence tended to show what DeVita and Grillo had done with the actual money stolen from the Universal Market immediately and shortly after the commission of the robbery and killing. Under the circumstances of the case, evidence of their acts and conduct immediately after the commission of the crime was relevant to the manner in which they disposed of part of the loot and tended to show their attitude toward the commission of such a crime.

The Supreme Court of New Jersey adequately passed upon the question thus, (11 N. J. p. 183):

> "The incidental disclosure of other offenses and criminal associations which were brought to light by the introduction of the evidence of which the defendants complain, under the circumstances of this case, was not error.
>
> "The evidence of matters subsequent to the robbery-killing was admissible to prove the distribution of spoils of the robbery. *United States* v. *Jackskion,* 102 F. 2d 683, 123 A. L. R. 116 (2 Cir., 1939), *certiorari* denied 307 U. S. 635, 59 S. Ct. 1032, 83 L. Ed. 1517 (1939); *2 Wharton's Criminal Evidence* (11th ed. 1935), sec. 746, p. 1258; 2 Alexander, *The Law of Arrest* (1949), sec. 385, pp. 1215-1217; *22 C. J. S., Criminal Law,* sec. 636, p. 974. And the fact that the evidence incidentally disclosed immoral activity does not require its exclusion."

POINT THREE.

The prosecutor's remarks in his opening and in his summation in which he referred to the defendants as members of an organized criminal group; and his remarks in connection with the statute providing for recommendation of life imprisonment were not prejudicial as to constitute a violation of due process.

The Supreme Court of New Jersey fairly and fully passed upon these questions and it did not decide any Federal constitutional question of substance contrary to the decisions of this Court.

Petitioner here complains of the prosecutor's remarks in his opening address to the jury in which he stated, in substance, that this is the kind of case (murder in the perpetration of robbery) in which the Legislature intended

that the penalty should be death; and he further complains that in his summation the prosecutor referred to the defendants and their associates as "The Associates Incorporated;" that they would "stickup" anybody, even some of the jurors; that they bought and sold guns and passed them around as if they were toothpicks; that they bought bullets and masks in order to prepare themselves for committing robberies; and they carried the briefcase with the articles from place to place, etc.

In the first place, it is to be noted that no objection was made by the defendants at the time the remarks were made, and under the New Jersey rule, it is incumbent upon a defendant to register an objection to any allegedly prejudicial remarks and request the court to instruct the jury to disregard the remarks. (*State* v. *Terry*, 91 N. J. L. 539, E. & A. 1917; *State* v. *Barts*, 132 N. J. L. 74, 84, aff'd 132 N. J. L. 420).

However, the trial court cured any possible harm when it instructed the jury, as follows, (R. 1141):

> "The Court is the judge of the law; the Court is the sole judge of the law. It is the function of the Court to pass upon all questions of law arising in the trial and to inform the jury of the law governing the case.
>
> "And by reason of that rule, it is the duty of the jury to follow the law as it may be stated by the Court. On the other hand, the jury are the judges of the facts; the jury are the sole judges of the facts. The Court has no power to decide or to instruct the jury how to decide any question of fact, because the jury are the sole and the exclusive judges of the weight of the evidence, the credibility of the witnesses, the inferences to be drawn from the evidence, and of all inferences, issues, and questions of fact whatever, including the ultimate conclusion of guilty

or not guilty, as well as the degree of guilt, if any, to be reached after a consideration of all of the evidence."

Again, the trial court stated (R. 1160):

"Now, Mr. Foreman, and members of the jury, what are the facts? That is for you to decide, for you in your capacity as jurors are the sole, final, conclusive and ultimate judges of the facts. The weight of the testimony is never dependent upon the number of witnesses. Necessarily in your capacity as *jurors,* as I have already indicated, you have the right to evaluate the demeanor of the witnesses as you listen to them, the manner in which they testify, to judge the comparative degree of frankness of the witnesses and to draw reasonable inferences from the testimony as you have heard it. All of these things fall peculiarly within your province as judges of the facts."

It was in the evidence that Grillo first went to the lockers in September, two months before the crime (R. 1048), and from that time down to the time of the crime he had three guns, a briefcase, a holster, several masks and bullets, all of which were placed in the locker. Grillo had the key, and he, DeVita and other associates had access to the locker and they all went there on numerous occasions.

This petitioner DeVita admitted at the trial that he had been to the lockers before the crime "Maybe ten times," (R. 908); that he had seen the briefcase "about 12 or 13 times," (R. 908); and that he had taken the gun used in the crime "Maybe two, maybe three" times prior to the crime (R. 911).

We submit that according to the evidence it was a reasonable inference that the guns, bullets, masks and holster, the usual equipment used by criminals in armed robberies,

were kept by Grillo, DeVita and their associates in the station locker for ready use in the commission of armed robberies; and that the briefcase was used by them as a convenient means of transporting the equipment from place to place with small chance of disclosure.

Following are cases in New Jersey in which it was held that remarks of the prosecutor were not prejudicial, but well within the evidence and reasonable inferences therefrom.

In *State* v. *Cioffe,* 128 N. J. L. 342 (Sup. Ct. 1942), affirmed in 130 N. J. L. 160 (E. & A. 1943), defendants were referred to as "scourges coming into the country;" "users of guns;" and "sources of seeds which must be removed."

In *State* v. *Barker,* 68 N. J. L. 19 (Sup. Ct. 1902), the prosecutor said that "a verdict of acquittal would be a miscarriage of justice."

In *State* v. *Lang,* 75 N. J. L. 1 (Sup. Ct. 1907), defendant was referred to as a "monster in his passions, licentious in his desires, beastly in his love, brutal when thwarted and cowardly when caught."

In *State* v. *Tansimore,* 3 N. J. 516 (S. C. 1950), the prosecutor told the jury, "Don't let this man, twice bloody, go twice unbowed." The remarks were held to be morally right, logically reasonable and justified by the record.

We respectfully submit that when the remarks complained of are read with the full context of the summation in connection with the evidence in the case, it cannot be said that they were inflammatory or prejudicial as to constitute a denial of due process. On the other hand, the remarks were logically reasonable and the inferences fully justified by the record.

With respect to the prosecutor's remarks on the purpose of the statute permitting the jury to attach a recommendation of life imprisonment to a first-degree verdict,

we submit that the remarks were not prejudicial when considered with the context of the entire summation, and the trial court properly instructed the jury on the statute.[4]

In its charge, the court told the jury that its first duty was to determine the guilt or innocence of the defendants, and then to fix the penalty; and that under the pertinent statute the jury had the right to return a verdict of first degree with or without recommendation, all of which was the jury's sole responsibility. (R. 1160-1161.)

The court then explained that because of "the rather varying statements" made by counsel in their openings and summations on the purport and effect of the statute, it would give the jury a "simple and precise statement" of the law as it has been construed by the courts of New Jersey. (R. 1161); and it proceeded to quote the precise rule established in New Jersey that, if the jury fails to recommend life imprisonment, the penalty would be death, and in such case the penalty is not determined by the jury but by virtue of the statute and pronounced by the court. (*State* v. *Molnar,* 133 N. J. L. 327, E. 7 A. 1945; *State* v. *Cordasco,* 2 N. J. 189, S. C. 1949; *State* v. *Bunk,* 4 N. J. 461, S. C. 1950, cert. den. 340 U. S. 839, 71 S. Ct. 25, 95 L. Ed. 615.)

Any possible prejudice that may have been created by the prosecutor's remarks complained of were amply and adequately cured by the court's instruction on the accepted law in New Jersey with respect to the statute in question, and its purpose and effect.

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[4] Under N. J. S. A. 2:138-4 (now 2A:113-4):

"Every person convicted of murder in the first degree * * * shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed."

In his Brief, (pp. 136-145), petitioner cites and quotes at length from numerous decisions which we do not consider to be applicable here. Those cases involved the misconduct of the prosecutor during the summation by referring to something outside the evidence, or appeals to passion or prejudice of the jury, or a suggestion that an acquittal would subject the jury to public scorn in the community, or a reference to defendant's right of appeal or right to apply for executive clemency, etc.

And in none of those cases does it appear that the jury had been cautioned by the court against being influenced by the allegedly prejudicial remarks.

As stated in *Comm.* v. *Meyers,* 290 Pa. 573, 581, 139 A. 374, 377 (Pa. S. C. 1927):

> "Where, under all the circumstances of the case, the verdict considered is a just one, the language of the prosecuting officer which will justify a reversal must be such that its unavoidable effect would be to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant, so that they could not fairly weigh in his behalf such circumstances of doubt, extenuation, or degree of guilt that may be present in the case, and thus make them unable to render a true verdict."

On this subject, it is stated in *3 Amer. Juris.,* sec 1063, p. 610, that one of the most general tests is whether or not the verdict was affected by the remarks, and to form a proper basis for a reversal there must be an "actual injury" to the defendant, and if there is any doubt as to the effect, the view should be taken that there was no prejudice.

In *Pietch* v. *U. S.,* 110 F. (2) 817 (10 Cir.), certiorari denied, 310 U. S. 648, 84 L. Ed. 1414, it was held that, even though the government attorney's argument in summation

was improper, where it appears from the entire record that the rights of the defendant were not prejudiced, the error, if any, must be regarded as harmless.

Upon examination of the entire record in the case at bar, there can be no other conclusion than that the verdict was a just and fair one; and it cannot be said that the prosecutor's remarks in any way prejudiced the defendants in the minds of the jury as to prevent them from properly weighing the degree of guilt that was present in the case.

We submit that the Supreme Court of New Jersey fairly and fully passed upon this question, and it properly concluded that, (11 N. J. p. 184):

> "It was his duty to prosecute with earnestness and vigor circumscribed with the obligation to refrain from improper methods. Though the statements were strong and forceful and the language used in referring to legislative intent was crude, the prosecutor confined himself to the evidence. Viewed in the light of the charge of the trial court they do not constitute ground for reversal." (citing, among others, *State* v. *Hauptmann*, 115 N. J. L. 76, E. & A. 1935, certiorari denied 296 U. S. 649, 56 S. Ct. 310, 80 L. Ed. 461).

POINT FOUR.

The Court's refusal to charge, in the language of the request, that intent is an element of robbery, was not error: and the charge as given amply covered the subject-matter of the request.

The Court's charge on the subject of recommendation of life imprisonment was not error.

The Supreme Court of New Jersey fairly and fully passed upon these questions, and it did not decide any Federal constitutional question of substance contrary to the decisions of this Court.

a.

As to the Refusal to Charge the Request.

Petitioner submitted the following Request (No. 41; R. 1172):

> "If the evidence or lack of it leaves a reasonable doubt in your minds that Silvio DeVita had the criminal intent to commit robbery; then he is not responsible for the ensuing death of James Law and you must acquit him."

Instead, the Court charged the following (R. 1145):

> "Robbery is defined as the stealing of property with violence from the person or personal custody of another; that is, the taking of property either by force or by putting the victim in fear of force.
>
> "If you find beyond a reasonable doubt from a consideration of all the evidence in this case that the defendants did commit a robbery upon the deceased, James Law, and that the defendants in committing the robbery as aforesaid did kill him, then the defendants are guilty of murder in the first degree."

> "You will note that the statute makes no mention of the element of the intention to kill in connection with a killing which shall be committed in perpetrating a robbery. In cases where death ensues from the commission of a robbery, the commission of the robbery is regarded as standing in the place of, the wilfulness, deliberation and premeditation required under the statute, and therefore the State is not under a duty to prove wilfulness, deliberation and premeditation where it has proved that a killing has been committed during the perpetration of a robbery, which is the contention of the State in this particular case."

Further, the Court charged (R. 1153):

> "Now, I have already indicated to you that under our law in this state, so far as the guilt or innocence of these defendants is concerned, intent, premeditation to kill, is not an essential element • • •"

Under this charge, the Court first gave the definition of robbery as it is defined in the New Jersey statute (N. J. S. A. 2:166-1) and then it told the jury that if they found that defendants killed the deceased during the commission of robbery they are guilty of murder in the first degree. The Court then explained that the felony-murder statute (N. J. S. A. 2:138-2) makes no mention of "intention to kill," and that the "commission of the robbery" takes the place of "intention to kill," which is a requirement of proof in the case of a murder committed with willfulness, deliberation and premeditation.

It is undisputed that felonious intent is an essential element of the crime of robbery which must be proved in the trial of that crime, and the Court would be required to charge on all of the essential elements of the crime of robbery.

But this was not a case of robbery, but a case of murder committed in the commission of robbery, and the only issue was whether the defendant did the killing while committing robbery. Proof of wilful intent to kill with deliberation and premeditation was dispensed with, and in its place was substituted proof of *commission of the robbery.*

In *State* v. *Calabrese,* 107 N. J. L. 115 (E. & A. 1930) (murder in attempted robbery), the defendant was asked the question in direct examination, "Did you at any time intend to kill him or seriously wound him?" and the trial court sustained an objection to the question. In upholding the trial court's ruling, it was stated, (p. 119 of opinion):

> "The evidence of the crime clearly established that at the time of the crime the defendants were engaged in an attempted robbery, so much being admitted by the defendant-witness Calabrese, and it was on this assumption that the question was excluded. When he deliberately shoots another it is murder regardless of the intent with which such killing is perpetrated, and if to be added thereto it is committed in the perpetrating or the attempt to perpetrate a robbery, by the statute it is murder in the first degree * * *."

In 40 C. J. S., sec. 33 (e), page 890, it is stated:

> "*Killing in perpetration of felony.* Where killing in the perpetration or attempt to perpetrate a felony or one of certain enumerated felonies is made murder in the first degree, *the perpetration or attempt to perpetrate the felony is regarded as standing in the place of or as the legal equivalent of the wilfulness, deliberation and premeditation necessary under the statute* as to other killings and dispenses with the necessity of proof thereof * * *" (italics ours).

The italicized portion of the above excerpt is almost identical with the portion of the court's charge on the subject in the instant case.

While the requested charge may have embraced a pertinent principle of law in a prosecution for robbery, it did not properly embrace a correct principle in the trial for murder while perpetrating robbery, which, under the statute, is murder in the first degree, and the sole issue is whether defendants killed the deceased during the commission of robbery.

In *Warren on Homicide,* Vol 4, sec. 327, page 99, it is stated:

> "Defining Other Offenses.—Where the evidence shows that the homicide was committed in the perpetration of another offense, it is proper for the court in its charge to the jury to define the other offense. But it has been held that the court is not required to do so • • •"

At the trial, there was no dispute by DeVita or Grillo that they went to the Universal Market on the night of the crime for the specific purpose of committing robbery.

Sergeant Kinney of the Homicide Squad testified that in the course of his interview with DeVita on the afternoon of November 15 DeVita stated "that he and Grillo agreed to do the stickup or robbery on Friday, November 9" (R. 778).

DeVita, in his cross-examination, when asked why he carried the gun, said it was "Because we were going to rob," (R. 916); that "We were supposed to both get in the car and drive away," (R. 917). He further testified as follows, (R. 927):

> "Q. And you walked over to his car, didn't you? A. Yes, sir.
>
> Q. For the purpose of sticking him up? A. Yes, sir.

Q. You were not scared then, were you? A. Yes, sir.

Q. You were still scared? A. Yes, sir.

Q. But you never thought it would be better to go home, did you? A. I was still scared.

Q. But you were interested in the six grand, weren't you? Weren't you interested in that? A. I didn't know how much was in it.

Q. You were interested in thousands of dollars, weren't you? A. Yes, sir."

And in his summation to the jury, DeVita's counsel made the following statement, (R. 1107):

> "The first part of your verdict, as far as I am concerned, you do not have to take much time about. If you will recall way back—it seems so long ago—last Wednesday I think—when I spoke to you first on what we might call my opening—I never once, and designedly so, used the word *defense,* and in this my summation, I shall not use, and designedly so, the word *acquittal.* It would be an insult to your intelligence, and it would be ridiculous on my part, so far as my client is concerned, to even suggest that he should be acquitted."

According to DeVita's counsel, in his summation, he conceded that DeVita participated in the robbery and killing, which, under the law constituted first degree murder, and his only plea to the jury was to have them recommend life imprisonment as the punishment.

Under these circumstances, it is difficult to see how DeVita could possibly have been harmed or prejudiced by the court's failure to charge the above request.

In the instant case, there was abundant evidence that DeVita and Grillo actually committed the robbery. They admitted, both in their statements and on the witness stand, that they had planned the robbery, that they went to the

station-locker to procure their guns; that they lay in wait across the street from the market and talked over the positions they were to take when the deceased's car appeared; that they went to the car, Grillo on the driver's side and DeVita on the passenger side; that Grillo fired the fatal shot and stole the money bag from the seat; that they escaped; and they later went to New York City where DeVita and Grillo each took a portion of the loot for purposes of entertainment, and they concealed the rest of the stolen money in the cellar of Grillo's home.

The evidence was conclusive of their intention to commit robbery and that the crime of robbery with all its necessary elements had been completed.

The court's definition of robbery as given, without a specific statement that criminal intent is an essential element of that crime, was amply sufficient to apprise the jury of the nature of the crime of robbery from which the killing ensued.

The charge as given embraced all of the issues in the case and the pertinent subject-matter contained in the proffered request, and the charge in its entirety fairly and fully stated the legal principles involved in the case; and it cannot be said that the court's refusal to charge the specific request to the effect that intent is an essential element of robbery in any way caused any prejudice in this petitioner DeVita, or his co-defendant Grillo.

b.

As to the Court's Charge on Recommendation of Life Imprisonment.

Under the New Jersey statute, *supra*, the jury is given the discretion of attaching to its verdict of guilty of murder in the first degree a recommendation of life imprisonment.

In its charge, the court told the jury that its duty was twofold; first, to determine the guilt or innocence of the defendants, and second, to fix the penalty if their verdict should be guilty of murder in the first degree. It then gave the substance of the statute empowering the jury to recommend life imprisonment, and it explained that the jury's determination on whether the penalty should be death or life imprisonment was the sole responsibility of the jury after a consideration of all the evidence in the case. The court also explained that if the verdict was guilty of murder in the first degree, without any recommendation attached, the death penalty would be imposed, and if they should recommend life imprisonment, that and no greater penalty could be imposed. The court emphasized that it was the jury's obligation to determine whether or not they should attach a recommendation of life imprisonment in the event the jury should find a verdict of guilty of murder in the first degree. (See Court's charge, R. pp. 1160-1161.)

In the Supreme Court of New Jersey, both petitioner DeVita and Grillo complained of the trial court's charge on the subject of recommendation of life imprisonment wherein it stated, (R. 1161):

> "* * * If that condition does arise, (a verdict of guilty without a recommendation), the penalty is death, determined not by the jury but by the statute and pronounced by the court. It is not correct to say that the jury imposes the sentence of death where it does not choose to make the recommendation for life imprisonment."

In passing on the propriety of the charge, the court below stated, page 189 of opinion:

> "* * * It is the function of the jury to adjudge the degree of guilt and for the court to pronounce

> the sentence. The court properly advised the jury as to its obligation and duty after having arrived at the degree of guilt then to determine, upon and after the consideration of all the evidence, whether to mitigate the death sentence. The form of verdict to pronounce that judgment was accurately explained. The phrases charged here have been expressed as the law of this state * * *" (citing State *v.* Bunk, 4 N. J. 461, 475, N. J. S. C. 1950, cert. den. 340 U. S. 839, 71 S. Ct. 25, 95 L. Ed. 615).

And further, the Court concluded, page 189:

> "In the present case the trial jury obviously was not misled by the quoted instructions for it made the recommendation as to Rosania, the third defendant, who has not appealed. Under all the circumstances and the charge as a whole, we are of the opinion that no error prejudicial to the substantial rights of the defendants was committed by the trial court in this connection."

The jury returned a verdict of guilty of murder in the first degree as to all three defendants, and they recommended life imprisonment only as to Rosania, as follows:

> "The Clerk: Mr. Foreman, how do you find?
>
> "The Foreman: We, the jury, find the defendant Silvio DeVita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree."

The Court, on its own motion directed that the jury be polled on the verdicts of DeVita and Grillo and the verdicts were affirmed by each individual juror. (See petition, pp. 34-35.)

Under the circumstances, the jury could not possibly have been misled by the court's charge on the subject of life imprisonment and petitioner was not prejudiced in his substantial rights.

POINT FIVE.

There was no violation of due process in the prosecutor's opening; or in the Court's charge on the kind of verdict the jury could return; or in the verdict.

First, it is to be noted that none of the questions argued under this point were presented in the appeal to the Supreme Court of New Jersey, and the State court of last resort was not given the opportunity of passing squarely upon any constitutional questions involved.

However, we submit that there was no denial of due process in any of the questions raised.

a.

As to the Prosecutor's Opening.

Petitioner complains of the following remarks of the prosecutor in his opening to the jury, (R. 230):

> "This killing, the state contends, was wilful and deliberate and when these defendants, as the evidence will show, agree and conspire to perpetrate robbery and they arm themselves with guns and one of the defendants fired the gun, killing James Law, they knew and realized what the results would be, and they deserve no consideration at your hands."

He further complains of the remarks, (R. 231):

> "* * * The state contends under the statute * * * that when a number of persons are acting together in

> a plan to commit robbery, a killing perpetrated in furtherance of the crime is deemed within the common purpose and all are alike responsible for it. The state says that each is responsible for everything done by his confederates which reasonably follows in the execution of the plan as one of the natural and probable consequences."

The trial court said it was permitting the remarks "because it concedes it is necessary in order for the state to make explicit what its contention is," that "the law of the case will be controlled by the court mainly in its charge at the end of the case," and that what the prosecutor is saying is "the condition which the state will project to you" (R. 232).

And the prosecutor continued with the statement that, "when several persons conspire and agree to commit the crime of robbery and together set out on the common purpose of robbing a person and murder results, all are equally guilty of murder in the first degree," (R. 232).

Petitioner's objection is that, "The prosecutor was proceeding on a theory of conspiracy to commit the crime of robbery which was at variance to the charge and confusing to the jury," (B. 166).

In this case, the charge was not conspiracy, but murder, the indictment being in the usual common law form, which is permitted in New Jersey. (*Titus* v. *State*, 49 N. J. L. 36, Sup. Ct. 1886; *State* v. *Juliano*, 103 N. J. L. 663, 667, E. & A. 1927).

The trial judge properly and plainly stated the State's contention and the law on the criminal liability of aiders and abettors, as follows, (R. 1146):

> "In this case the State contends that all three defendants aided and abetted in the robbery perpe-

trated upon James Law. The State further contends that during the perpetration of the robbery James Law was shot and killed by the defendant Grillo. That contention of course raises the question of the criminal responsibility of the defendants DeVita and Rosania if you find beyond a reasonable doubt that they, or either of them, aided or abetted the robbery.

"Now, the law with respect to aiders and abettors is as follows: If two or more persons act in concert in committing a criminal offense such as the one here charged, all those who participate in the committing of the criminal offense are equally guilty of that offense regardless of what part each one took in the commission of the crime.

"Consequently, if a killing is brought about by the actions of those involved in the hold-up, all are guilty of murder in the first degree regardless of what their participation may have been, and therefore in the eyes of the law as far as their guilt or innocence is concerned, it makes no difference that DeVita did not fire the shot that killed James Law, nor that Ralph Rosania was not at the scene of the actual killing if you find beyond a reasonable doubt that either or both of them, as the case may be, aided and abetted in the planning of the robbery as I have explained that principle to you."

The court's charge was in conformity with the established law of New Jersey that, where several persons enter into a conspiracy for the common object of committing robbery, and, in the perpetration or attempted perpetration of the crime, one of the conspirators does an act which causes the death of a third person, all are principals in the commission of the homicide, which is murder in the first degree by statute. (*State* v. *Mule,* 114 N. J. L. 384, E. & A. 1935.)

b.

As to the Court's Charge on the Form of Verdict.

Petitioner complains of the following portion of the court's charge, (R. 1161-1162):

> "So, Mr. Foreman and members of the jury, under the facts of this case as they are presented to you, you should bring in one of three verdicts as to each of the defendants, Silvio DeVita, Ralph Rosania and Joseph Grillo. They are either (1) guilty of murder in the first degree, or (2) guilty of murder in the first degree with a recommendation of life imprisonment or (3) not guilty. You will understand, of course, that whichever of the three verdicts you arrive at as to each defendant must be the unanimous verdict of the jury.
>
> "You will recall that I mentioned previously we are in effect trying three cases in one and that each defendant is entitled separately to your consideration and verdict. Therefore the form of your verdict should be as follows, it being understood that your verdict as to each defendant, whatever it may be, shall be the unanimous verdict of the jury. We find the defendant Silvio DeVita guilty of murder in the first degree; or we find him guilty of murder in the first degree with a recommendation of life imprisonment, or we find him not guilty, as the case may be."

The court repeated the same with respect to each of the other two defendants, and named them individually.

We submit the court gave the jury a clear and concise statement as to the form of verdict they could bring in, and it was not at all confusing.

c.

As to the Verdict and Polling of the Jury.

Following was the verdict as announced by the foreman of the jury, (R. 1165):

> "The Clerk: Ladies and Gentlemen have you agreed upon a verdict?
>
> The Foreman: We have.
>
> The Clerk: Mr. Foreman, how do you find?
>
> The Foreman: We, the jury, find the defendant, Silvio DeVita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree."

The Clerk repeated the verdict as announced by the foreman, (DeVita's petition, p. 35):

> "The Clerk: Ladies and gentlemen of the jury, harken to your verdict as the Court will have it recorded. You say by your foreman that you find the defendant Silvio DeVita guilty of murder in the first degree. You further say that you find the defendant Ralph Rosania guilty of murder in the first degree and recommend life imprisonment. You further say you find the defendant Joseph Grillo guilty of murder in the first degree."

The Court, on its own motion, directed that the jury be polled on their verdict as to DeVita and Grillo, (R. 1165):

> "The Court: The Court of its own motion will direct the clerk to poll the jury on the verdicts of the defendants Grillo and DeVita."

The Clerk announced, "By order of the Court the jury is to be polled," (DeVita's petition, p. 35.)

The Clerk, prior to the taking of the poll, stated to the jury, (DeVita's petition, p. 35):

> "You have heard the verdict as rendered by your foreman, wherein you say the defendants Silvio DeVita and Joseph Grillo are guilty of murder in the first degree. As the roll is called, you will answer by a yes or no answer whether this is your verdict or not."

The Clerk called upon each and every juror by name, and each answered "Yes" to his inquiry.

We submit that under these circumstances the verdict was legal and in strict conformity with the law.

Cases cited and quoted from by petitioner are not in point and are distinguishable from the instant case.

In *State* v. *Merra,* 103 N. J. L. 361 (E. & A. 1927), (B. p. 167), there were two defendants, and the jury's verdict as certified by the court was, "We find Salvatore Merra guilty of murder in the first degree. We find Salvatore Rannelli guilty of murder in the first degree and recommend life imprisonment." The verdict was held to clearly indicate that the recommendation applied only to Rannelli and not to Merra.

In *State* v. *Cleveland,* 6 N. J. 316 (S. C. 1951), (B. p. 171), the verdict announced by the jury foreman was "guilty of murder in the first degree," but in the requested poll, each juror was asked how he or she "found", and each replied, "Guilty", without specifying the degree. The verdict was held invalid because of the failure of each juror to affirm his concurrence in the announced verdict, and the failure of each juror to specify the degree.

The circumstances in *Williams* v. *State,* 60 Md. 402 (Ct. App. 1883) and *Commonwealth* v. *Schmous,* 162 Pa. St. 326 (Sup. Ct. 1894 B. p. 175) were similar to those in the *Cleve-*

land case, *supra,* a failure of the verdict of each individual juror, on the poll, to affirm his concurrence in the verdict announced by the foreman and failure to specify the degree.

In *State* v. *Cooper,* 2 N. J. 540 (S. C. 1949) (B. p. 176), the jury's verdict as announced by the foreman was merely "guilty", and on the poll each juror affirmed his concurrence in the verdict without specifying any degree.

That is not the situation here. The jury's verdict as announced by the foreman was guilty of murder in the first degree as to all three defendants with a recommendation of life imprisonment as to Rosania only. The Clerk repeated the verdict in the exact words as announced by the jury foreman. When the poll was directed, the Clerk again repeated the announced verdict as to DeVita and Grillo, "guilty of murder in the first degree", and he requested that on the poll each juror should signify by a yes or no answer, whether the verdict as previously announced by the foreman and twice repeated by the Clerk was or was not his or her individual verdict. And each juror replied, "Yes," thus affirming his and her concurrence in the verdict.

We, therefore, respectfully submit that there is no substance in petitioner's complaint that he was denied due process of law on any of these grounds.

VII.

Conclusion.

For the reasons herein set forth, we respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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